90-1197

No. 90-___

Supreme Court, U.S.
FILED
JAN 25 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DAVID L. FITZ,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HUGH L. REILLY
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel of Record for
Petitioner

January 25, 1991

QUESTION PRESENTED

Does the limitations period of *Reed v. United Transportation Union*, 488 U.S. 319 (1989) or that of *DelCostello v. Teamsters*, 462 U.S. 151 (1983) apply to an employee's claim that he was discharged from employment for exercising his rights of free speech and expression under *Communications Workers v. Beck*, 487 U.S. 735 (1988), brought against his employer and exclusive bargaining representative?

PARTIES TO THE PROCEEDINGS

The parties to appellate proceedings in the United States Court of Appeals for the District of Columbia Circuit were appellant, David L. Fitz, and appellees, Communications Workers of America ("CWA"); CWA Local 4251; American Telephone and Telegraph-Communications, Inc.; Rosemary M. Collyer, individually and as General Counsel of the National Labor Relations Board; and Ronald M. Slatkin, individually and as Acting Director of the Office of Appeals of the General Counsel of the National Labor Relations Board.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

Material Facts 3

Litigation History 4

REASONS FOR GRANTING THE WRIT REQUESTED 6

A. Importance Of The Case 6

B. The Facts Here Establish The Need To Answer The State Action Question Explicitly Left Open In *Beck* 8

1. State Action Is Present Through Exclusive Representation 9

2. State Action Permeates The Collection Scheme Found In § 8(a)(3) 11

TABLE OF CONTENTS - CONTINUED

Page

3. Public- And Private-Sector Employees' Rights Are Equal 13

C. Even Without State Action, The Curtailed Limitations Period Is Not Applicable 15

CONCLUSION 20

APPENDICES

A. Judgment Of The United States Court Of Appeals For The District Of Columbia Circuit 1a

B. Memorandum Opinion Of The United States District Court For The District Of Columbia 3a

C. Order Of The United States District Court For The District Of Columbia 21a

D. Complaint Filed In The United District Court For The District Of Columbia 23a

E. Answer To Complaint Filed In The United States District Court For The District Of Columbia 32a

F. Motion To Dismiss For Failure To State A Claim Filed In The United States District Court For The District of Columbia 36a

TABLE OF CONTENTS - CONTINUED

Page

G. Motion For Judgment On The Pleadings Filed In The United States District Court For The District Of Columbia 38a

TABLE OF AUTHORITIES

Cases

Page

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 9, 13-15

Adams v. Gould, Inc., 739 F.2d 858
(3d Cir. 1984), *cert. denied*,
469 U.S. 1122 (1985) 18-19

Beck v. Communications Workers,
800 F.2d 1280 (4th Cir. 1986),
aff'd, 487 U.S. 735 (1988) ..... *passim*

Chicago Teachers v. Hudson,
475 U.S. 292 (1986) 4, 15

Dean v. TransWorld Airlines, Nos. 85-4384
& 85-4399, slip op. at 9
(9th Cir. Jan. 22, 1991) 13

DelCostello v. Teamsters,
462 U.S. 151 (1983) ..... *passim*

Ellis v. Railway Clerks,
466 U.S. 435 (1984) 14-15

Fuentes v. Shevin, 407 U.S. 67 (1972) 13

Havas v. Communications Workers,
509 F. Supp. 144 (N.D.N.Y. 1981) 16

Jordi v. Sauk Prairie School Board,
651 F. Supp. 1566 (W.D. Wis. 1987) 13

TABLE OF AUTHORITIES - CONTINUED

Page

Karahalios v. National Federation of Federal Employees, ___ U.S. ___, 109 S. Ct. 1282 (1989) 10

Keller v. State Bar, ___ U.S. ___, 110 S. Ct. 2228 (1990) 14-15

Kolinske v. Lubbers, 712 F.2d 471 (D.C. Cir. 1983) 14-15

Machinists v. Street, 367 U.S. 740 (1961) 11, 15-16

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) 10

NLRB v. General Motors Corp., 373 U.S. 734 (1963) 11

Pattern Makers' League v. NLRB, 473 U.S. 95 (1985) 19

Reed v. United Transportation Union, 488 U.S. 319 (1989) ..... *passim*

Seay v. McDonnell Douglas, 427 F.2d 996 (9th Cir. 1970) 16

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 13

Trbovich v. UMW, 404 U.S. 528 (1972) 10

Wilson v. Garcia, 471 U.S. 261 (1985) 13, 15

TABLE OF AUTHORITIES - CONTINUED

Page

Constitutional Provisions

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. V 2, 15-16

Statutory Provisions

28 U.S.C. § 1254(1) 2

28 U.S.C. §§ 1331 and 1337 2

28 U.S.C. § 2201 5

National Labor Relations Act

29 U.S.C. § 141 *et seq.* 5

§§ 2(2), (3) & (5), 29 U.S.C. §§ 152(2), (3) & (5) 9

§ 7, 29 U.S.C. § 157 5

§ 8(a)(3), 29 U.S.C. § 158(a)(3) ..... *passim*

§ 8(d), 29 U.S.C. § 158(d) 9

§ 9(a), 29 U.S.C. § 159(a) ..... *passim*

Labor-Management Reporting and Disclosure Act

§ 101(a)(2), 29 U.S.C. § 411(a)(2) 7, 17, 19

TABLE OF AUTHORITIES - CONTINUED

Page

Employment Retirement Income Security Act

29 U.S.C. § 1001 18

D.C. Code Ann. § 12-301(8) (1981) 19

Ill. Ann. Stat. § 13-205 (Smith-Hurd 1984) 19

Rules

Rule 10.1, U.S. Supreme Court 4

Rule 13.1, U.S. Supreme Court 2

Fed. R. App. P. 4 2

No. 90-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAVID L. FITZ,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, David L. Fitz ("Fitz"), respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review portions of the judgment, filed October 30, 1990, as it applies to the respondents, American Telephone and Telegraph-Communications, Inc. and the Communications Workers of America.

OPINIONS BELOW

The Memorandum Opinion ("Memorandum") and the Order ("Order") of the district court dismissing Fitz's claims against all defendants were filed on August 17, 1989. They are not officially reported, but appear unofficially as *Fitz v. Communications Workers*, 132 L.R.R.M. (BNA) 2186 (D.D.C. 1989). The Memo-

randum is reprinted in the Appendix ("App.") at 3a; the Order is reprinted at App. 21a.

The judgment, *per curiam* and without opinion, of the United States Court of Appeals for the District of Columbia Circuit is unreported; it is reprinted at App. 1a.

JURISDICTION

Jurisdiction of the United States District Court for the District of Columbia, as the predicate for the issues raised by this petition, is invoked pursuant to 28 U.S.C. §§ 1331 and 1337. The Order of that court dismissing Fitz's claims is dated August 17, 1989.

A notice of appeal to the United States Court of Appeals for the District of Columbia Circuit was filed on September 11, 1989, within the time prescribed by Fed. R. App. P. 4. That court's judgment, affirming the district court, was filed on October 30, 1990.

The instant petition for certiorari is being filed on January 25, 1991, within the time prescribed by this Court's Rule 13.1, and is authorized by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

The first amendment: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The fifth amendment: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

Statutory Provisions:

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3): "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ."

Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a): "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

STATEMENT OF THE CASE

Material Facts

Fitz, at relevant times in 1986, was employed by the American Telephone and Telegraph-Communications, Inc. ("ATT").[1] ATT recognizes the Communications Workers of America and its Local 4251 (collectively "CWA") as the "exclusive representative"

---

[1] Fitz became an employee of ATT as a result of "divestiture" in 1984. Prior to that time he was employed by Illinois Bell Telephone Co., with approximately 19 years service, where he had been a voluntary member of the International Brotherhood of Electrical Workers, a labor organization.

of employees in a bargaining unit, which included Fitz, for the purposes of negotiating and enforcing the applicable collective bargaining agreement. In 1986 ATT and CWA had in effect such an agreement which purported to require employees in that bargaining unit to "pay or tender to [CWA] amounts equal to the periodic dues applicable to [voluntary] members."[2] Fitz, who had deep philosophical objection to CWA,[3] declined to pay or tender the dues-equivalent amounts demanded; instead, he demanded an "accounting" of CWA's costs of collective bargaining and contract administration, including grievance adjustment (hereinafter "collective bargaining"). CWA did not provide the accounting Fitz sought; instead, it made a demand that ATT discharge Fitz from employment. ATT executed CWA's demand without first insuring that Fitz was provided with an accounting of CWA's collective bargaining costs.[4]

Litigation History

Fitz asserted claims before the National Labor Relations Board ("NLRB").[5] He also filed a complaint in the United

---

[2] Article 17 of the Agreement between ATT and CWA, effective at the time of Fitz's discharge.

[3] Fitz's objection stems from CWA's refusal to support a strike undertaken by the International Brotherhood of Electrical Workers while he was a voluntary member of that union.

[4] As this petition demonstrates below, Fitz was discharged in violation of rights this Court confirmed in *Beck v. Communications Workers*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988) and *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986).

[5] The NLRB General Counsel and a subordinate were defendants in Fitz's complaint in district court, and parties in the court of appeals. Although Fitz continues to believe the actions of those defendants with respect to him were profoundly wrong, he raises no issue with respect to them here. He reluctantly concludes that because of the unique circumstances surrounding the NLRB defendants' handling of his case, the criteria of this Court's Rule 10.1 cannot be met with respect to them.

States District Court for the District of Columbia on May 5, 1988.[6] Germane to this petition, the complaint asserts that CWA's demand that he be discharged from employment, and ATT's execution of that demand, violate Fitz's rights under the National Labor Relations Act ("NLRA")[7] and the Constitution of the United States. Specifically, Fitz sought a declaratory judgment pursuant to 28 U.S.C. § 2201 which states that the agreement between CWA and ATT, on its face and as applied, violates his rights:

> (a) to "refrain" from supporting CWA's activities other than collective bargaining on his behalf with ATT from which he is shown to benefit under § 7 of the [NLRA];
>
> (b) to be free from forced association for which there is no compelling governmental necessity or rational basis under the first amendment; and
>
> (c) to procedural protections under § 7 of the [NLRA] and the first amendment ensuring that he is not forced to subsidize, even temporarily, CWA's activities other than collective bargaining on his behalf with ATT from which he is shown to benefit[.][8]

Based upon his rights so declared, Fitz sought a mandatory injunction as to ATT and CWA which requires that:

> (1) Plaintiff Fitz be reinstated to the position he held immediately prior to discharge or its exact equivalent, including attendant benefits;

---

[6] The complaint is reprinted at App. 23a.

[7] 29 U.S.C. § 141 *et seq.*

[8] Complaint, App. at 29a.

(2) CWA and ATT excise the dues-equivalent payment requirement from the face of the agency shop provisions of the agreement;

(3) [CWA and ATT] demand no greater payment from Plaintiff Fitz than CWA's demonstrated costs of collective bargaining on his behalf with ATT from which he is shown to benefit; [and]

(4) [CWA and ATT] provide Plaintiff Fitz with the constitutionally required informational and procedural protections in the determination of CWA's costs of collective bargaining on his behalf with ATT from which he is shown to benefit.[9]

The District Court dismissed Fitz's constitutional claims on grounds that ATT's and CWA's negotiation and enforcement of dues-equivalent obligations for nonmembers "d[oes] not involve state action."[10] Fitz's statutory claims were dismissed on grounds that they were barred by limitations.[11]

REASONS FOR GRANTING THE WRIT REQUESTED

A. Importance Of The Case

This case raises a fundamental question concerning the limitations period available to protect employees asserting the right to be free from coerced belief and expression under this Court's decision in *Communications Workers v. Beck*.[12] It is a

---

[9] Fitz's claims for injunctive relief and damages appear at App. 30a.

[10] Memorandum, App. at 6a.

[11] *Id.* at 7a-9a.

[12] 487 U.S. 735 (1988).

question this Court was not called upon to answer in *Beck*. The answer may require the Court to address the "state action" issue explicitly left open in *Beck*.[13] Even if "state action" is left aside, the decision below conflicts in principle with the Court's decision in *Reed v. United Transportation Union*,[14] where employees' equivalent right under § 101(a)(2) of the Labor-Management Reporting and Disclosure Act ("LMRDA")[15] to be free from coerced belief and expression was at risk.

Although of foremost concern to Fitz who has actually been discharged from employment in violation of *Beck*, the applicable limitations period is also of major significance to other employees subject to the "condition of employment" language in NLRA § 8(a)(3) and to dues-equivalent requirements such as those found in CWA's bargaining agreements.[16] Under such agreements, employees are daily threatened with the same employment sanction—discharge—that Fitz has been required to endure. This is true even though this Court has found that Congress provided "only the most grudging authorization of such agreements."[17] For those vast numbers of employees, the applicable limitations period determines not only the post-exaction period within which they can assert claims, but also the time covered by their retrospective recovery of impermissibly exacted fees[18] after they learn

---

[13] *Id.* at 761. ("We need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action.")

[14] 488 U.S. 319 (1989).

[15] 29 U.S.C. § 411(a)(2).

[16] In deliberate disobedience to *Beck*, CWA continues to include dues-equivalent obligations for nonmembers in its bargaining agreements with ATT and "baby Bells", and other private-sector agreements. This is the case even with agreements which expired and were renegotiated after *Beck* was decided.

[17] *Beck*, 487 U.S. at 755.

[18] *Id.* at 760.

that they actually have *Beck* rights under dues-equivalent agreements.[19]

Of the approximately 626,000 employees CWA represents under the NLRA, at least 65,000 are nonmembers in states where the protections of a Right to Work law do not apply. Nonmembers represented by labor organizations under the NLRA other than CWA also have *Beck* claims, although their precise national figures are not generally known. However, CWA itself has indicated that some 6,000,000 employees are covered by "union security" provisions in states with no Right to Work law.[20] If the same ratio of members to nonmembers at CWA holds for other unions under the NLRA, the rights, under *Beck*, of more than 600,000 nonmembers depend upon the outcome of this case. Even if the exact number were somewhat less than CWA's figure, it is clear that the right of vast numbers of nonmembers to be free from coerced belief and expression would artificially be curtailed if an abbreviated limitations period were applied to *Beck* cases.

B. The Facts Here Establish The Need To Answer The State Action Question Explicitly Left Open In *Beck*

As noted above,[21] this Court in *Beck* explicitly left the state action question open. Fitz submits that state action is present in two separate aspects of the employer/union/nonmember relation-

---

[19] This Court has not yet determined whether the dues-equivalent language in the bargaining agreements is such fraud as would toll the limitations period, despite the fact that the language is grossly misleading to the lay people at whom it is directed. Even in discharge situations, lay people are in stunned disbelief that "the law" allows the respected, if not sacrosanct, bargaining agreement to misrepresent their obligations.

[20] CWA's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, submitted in *Communications Workers v. Beck*, No. 86-637 (U.S., 1986), at 6.

[21] *See supra* note 13.

ship under the NLRA: 1) nonmembers must accept the union as "exclusive representative" under § 9(a) of the NLRA[22]; and 2) the "condition of employment" language of § 8(a)(3) of the NLRA[23] and of agreements such as the ATT/CWA agreement means that, like Fitz, employees are subject to discharge for their failure to comply with employer/union violations of *Beck* through illicit dues-equivalent requirements where there has been no judicial determination of debt. State action is also present because this Court unequivocally equates the rights of public-sector employees (where constitutional limitations unquestionably apply)[24] and private-sector employees (where the applicability of constitutional limitations is raised by this petition). We address these three points in turn.

1. State Action Is Present Through Exclusive Representation

Section 9(a) of the NLRA makes "labor organizations," such as CWA, the "exclusive representative" of "employees," such as Fitz, for dealing with "employers,"[25] such as ATT, over the employees' "wages, hours, and other terms and conditions of employment."[26] This statutory grant of authority to the labor organization has no constitutional implications for voluntary union members—the union acquires the right to represent such members in collective bargaining by consent; presumably those members would select the particular labor organization to

---

[22] 29 U.S.C. § 159(a).

[23] 29 U.S.C. § 158(a)(3).

[24] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

[25] The NLRA's definitions of "employer," "employee" and "labor organization" are respectively found in §§ 2(2), (3), and (5) of the NLRA, 29 U.S.C. §§ 152(2), (3), and (5).

[26] The "employer"/"labor organization" obligation to bargain is found in § 8(d) of the NLRA, 29 U.S.C. § 158(d).

represent them in negotiating and enforcing an agreement with their employer, with or without § 9(a), and with or without other NLRA provisions constituting part of applicable law.

However, decisions of this Court repeatedly emphasize the incredible and unique impact the statutory grant of exclusive representation to a labor organization has on the preexisting rights of nonmembers to represent themselves or select another labor organization as representative:

> [B]y providing for exclusive bargaining agents, the pertinent statutes deprived bargaining unit employees of their individual rights to bargain for wages, hours and working conditions.[27]
>
> Having conferred substantial power on labor organizations, Congress [in the LMRDA] began to be concerned about the danger that union leaders would abuse that power, to the detriment of the rank-and-file members.[28]
>
> The [national labor] policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.[29]

There can be no plausible argument made that state action does not permeate a statutory scheme which this Court has found "deprive[s] . . . employees of their individual rights," "confer[s]

---

[27] *Karahalios v. National Fed'n of Fed. Employees*, ___ U.S. ___, 109 S. Ct. 1282, 1288 (1989).

[28] *Trbovich v. UMW*, 404 U.S. 528, 530-31 (1972).

[29] *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

substantial power on labor organizations," and "extinguishes the individual employee's power." And it cannot be denied that Fitz and other employees are deprived of their individual rights to free speech and expression through the substantial power the NLRA confers upon CWA through exclusive representation, and that Fitz's job was extinguished, and other employees' jobs are threatened, by CWA's callous exercise of that power in defiance of *Beck*. Thus, the state action that is unavoidably confronted when exclusive representation is analyzed, is shown with dramatic clarity when Fitz's discharge and the threatened discharges of other employees reveals how exclusive representation under the NLRA and other labor relations statutes works in fact.

2. State Action Permeates The Collection Scheme Found In § 8(a)(3)

Section 8(a)(3) of the NLRA explicitly authorizes agreements which require "as a condition of employment" membership in the labor organization that is the employee's exclusive representative under § 9(a) of the Act. The "membership" term of § 8(a)(3) has been "whittled down to its financial core."[30] *Beck* establishes that the "financial core" required of nonmembers is *not* the payment of dues-equivalent amounts, but, instead, is the employees' pro rata share of the exclusive representative's costs of negotiating and administering the applicable collective bargaining agreement.[31]

Nevertheless, ATT and CWA here, and employers and unions generally, under color of § 8 (a)(3), have agreements that require nonmembers to pay dues-equivalent amounts in defiance of *Beck*, *and which make those dues-equivalent payments a condition of employment*. In this way, whatever the labor organization demands by way of fees is surrendered to it under threat

---

[30] *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963).

[31] *Beck*, 487 U.S. at 751, citing *Machinists v. Street*, 367 U.S. 740, 764 (1961).

of employee discharge from employment. In Fitz's case, that threat was actually carried out, and the deprivation of rights through the statutory scheme made clear.

The dues-equivalent exactions and Fitz's discharge occurred without the CWA being required, as would any other putative creditor, to establish the debt to the satisfaction of a judicial officer prior to the entry of judgment and any collection. In essence, the condition of employment language of § 8(a)(3), operating through the ATT/CWA and other bargaining agreements, operates as an extra-judicial mechanism for the enforcement of a "debt" without proofs, in which the sanction is the ultimate one of "industrial capital punishment," discharge from employment. This is a sanction so severe that the judiciary could not impose it even if court proceedings were initiated and concluded, the debt established, and a judgment entered.[32]

If the operation of the "condition of employment" language of § 8(a)(3) were not available to ATT and CWA, CWA could not have discharged Fitz from employment and could not threaten other employees with the same sanction. Instead, CWA would have been required to file suit, *make proofs*, and obtain a judgment, like any other putative creditor. Under debt suit practice universally applicable in our system to all but labor organizations, ATT and CWA would be required to await the outcome of a debt suit, and, even then, could not discharge Fitz as a result. The § 8(a)(3) scheme, then, not only provides CWA and other labor organizations with a levy without proofs, but with a sanction unavailable to other creditors, even where proofs are made. Section 8(a)(3), on its face and as it is universally applied, constitutes state action which requires constitutional analysis of

---

[32] In this way the statutory scheme operates virtually identical to the debtors' prisons this country long ago abandoned as uncivilized.

Fitz's claims.[33] And, when that analysis is completed, it results in the conclusion that Fitz's complaint in district court was timely filed under *Wilson v. Garcia*.[34]

3. Public- And Private-Sector Employees' Rights Are Equal

The *Wilson v. Garcia* limitations period applies to claims of public sector employees which duplicate Fitz's claims here.[35] Therefore, Fitz's district court complaint was timely filed because, under this Court's precedents, the rights of public- and private-sector employees are the same. *Abood*[36] makes this absolutely clear in holding:

> The only remaining constitutional inquiry . . . therefore, is whether a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation. We think he does not.[37]
>
> The very real differences between exclusive-agent collective bargaining in the public and private sectors are not such as to work any

---

[33] *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Dean v. TransWorld Airlines*, Nos. 85-4384 & 85-4399, slip op. at 9 (9th Cir. Jan. 22, 1991).

[34] 471 U.S. 261 (1985).

[35] *Jordi v. Sauk Prairie School Bd.*, 651 F. Supp. 1566, 1573 (W.D. Wis. 1987).

[36] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

[37] *Id.* at 229.

> greater infringement upon the First Amendment interests of public employees.[38]
>
> The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights.[39]

Just last year, this Court adhered to *Abood* in *Keller v. State Bar*.[40] As relevant here, *Keller* states:

> While the decision in *Abood [v. Detroit Board of Education*, 431 U.S. 209 (1977)] was also predicated on the grounds that a public employee could not be compelled to relinquish First Amendment rights as a condition of public employment, see 431 U.S., at 234-236, . . . in the later case of *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), . . . the Court made it clear that the principles of *Abood* apply equally to employees in the private sector.[41]
>
> [The State Bar] is. . . subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees.[42]

Instead of applying these precedents, the courts below inexplicably adhered to the 1984 circuit decision in *Kolinske v.*

---

[38] *Id.* at 230.

[39] *Id.* at 232.

[40] ___ U.S. ___, 110 S. Ct. 2228 (1990).

[41] *Id.* at ___, 110 S. Ct. at 2234.

[42] *Id.* at ___ , 110 S. Ct. at 2235.

Lubbers[43] to conclude that there is no state action in the circumstances found here.[44] That slavish adherence to circuit precedent is plain error, as *Kolinske* was highly questionable under this Court's earlier precedent, *Abood* in 1977, and is clearly overruled by the later decisions in *Ellis*[45] in 1984, and *Keller* in 1990. It is clear, when analyzed in light of *Ellis* and *Keller*, that Fitz was discharged without the procedural protections required by *Hudson*,[46] and that *Wilson*[47] provides the applicable limitations period for his claim.

C. Even Without State Action, The Curtailed Limitations Period Is Not Applicable

Even if it could be concluded, despite the precedents above, that (somehow) state action were not directly involved in the NLRA's grant to labor organizations of exclusive representation in § 9(a) and the extra-judicial collection scheme of § 8(a)(3), first and fifth amendment constitutional concerns do permeate those statutory grants. In *Abood*, this Court cites the earlier decision in *Street* as one of "two cases in this Court that on their face go far toward resolving the issue"[48] presented. In *Beck*, this Court termed *Street* "controlling."[49] Fitz submits that the reason *Street* was determined to be of such significance in both sectors

---

[43] 712 F.2d 471 (D.C. Cir. 1983).

[44] Memorandum, App. at 6a.

[45] *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

[46] *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986).

[47] *Wilson v. Garcia*, 471 U.S. 261 (1985).

[48] *Abood*, 431 U.S. at 217.

[49] *Beck*, 487 U.S. at 745.

of employment is that the record in the case presented "constitutional questions . . . of the utmost gravity."[50]

The clearest statement known to us demonstrating that constitutional concerns infuse such cases in both sectors is found in *Seay v. McDonnell Douglas*.[51] In *Seay*, a case like this one where the employment/labor organization relationships are under the NLRA, the Court states:

> The position taken by the [Supreme] Court in . . . *Street* . . . is strong medicine. It is not equivocal. Indeed, it contains constitutional overtones which appear to be foregone only by use of statutory construction to avoid First and Fifth Amendment issues.[52]

That being the case, the decision of this Court providing applicable precedent is *Reed v. United Transportation Union*,[53] and not *DelCostello v. Teamsters*[54]. The decisions below[55] concluded that *DelCostello* applied even though it was *also* concluded that "*Beck* does serve to protect a similar employee interest as that protected by the LMRDA."[56] This occurred

---

[50] *Street*, 367 U.S. at 749.

[51] 427 F.2d 996 (9th Cir. 1970).

[52] *Id.* at 1004; *accord Havas v. Communications Workers*, 509 F. Supp. 144 (N.D.N.Y. 1981).

[53] 488 U.S. 319, 332 (1989). *Reed* decided the applicable limitations period to cover union members' "free speech" claims under § 101(a)(2) of the LMRDA.

[54] 462 U.S. 151 (1983).

[55] Memorandum, App. at 8a-9a.

[56] *Id.* at 9a.

primarily because, in the district court's view, "a claim under *Beck* is nevertheless more closely analogous to the claims in *Del-Costello* than to that in *Reed*."[57] That weak conclusion, Fitz respectfully submits, does not withstand analysis.[58]

Fitz concedes that the six-month limitations period of *DelCostello* applies to bar garden variety grievances which are tardily filed. Applicable considerations are markedly different, however, in a case such as this one where first and fifth amendment concerns permeate the employee's discharge. In each case,

---

[57] *Id.*

[58] The district court, Memorandum at 9a, identifies four other factors to support the view, which Fitz contends is erroneous, that *Reed* is inapposite and that *DelCostello* controls. They are:

(1) That employee "free speech" rights under *Beck* are "more similar" to unfair labor practices than to comparable "free speech" rights under the LMRDA. This view was rejected by *Beck*, itself, which provides district court, and not National Labor Relations Board, jurisdiction over such claims. *Beck*, 487 U.S. at 743.

(2) That *DelCostello* and the instant case both involve employee discharges from employment. While true, this fact represents only one aspect of the problem, and it is *not* dispositive. The fact of discharge may well determine when limitations begins, but it does not decide the duration of the limitations period. The duration of limitations is decided by the reasons why the discharge occurred, and because Fitz's discharge resulted from his exercise of the right to be free of coerced belief and expression, *Reed* controls the limitations period here.

(3) That the "national policy of private settlement of labor disputes" requires application of *DelCostello*. Such a "policy" can have no application here, where joint ATT and CWA complicity resulted in Fitz's discharge, and CWA refused to file a grievance under the bargaining agreement to rectify the discharge. And

(4) that if *Beck* rights are not given the *DelCostello* truncated limitations period, more than one limitations period would apply to rights asserted under the NLRA. *Reed*, itself, rejects this factor, acknowledging that the decision there results in separate limitations periods under § 101(a)(2) of the LMRDA.

the reasons for discharge must be examined *before* the appropriate limitations period can be determined.[59]

Moreover, *DelCostello* contemplates a situation not found here. That case presumes the existence of actual representation by the labor organization, even if that representation is shown in some way to be inadequate.[60] In such a situation, it is to be expected that the labor organization has at least some interest in protecting the employee's rights, through negotiation, filing grievances, or litigation. However, in Fitz's case and all disputes over representation fees, the nonmember's interests and those of the labor organization are antagonistic from the beginning. *DelCostello* did not contemplate, and should not rule, cases such as this one.

Applicable precedents in addition to *Reed*, Fitz submits, do show that the longer limitations period governs his case and similar situations. In *Adams v. Gould, Inc.*,[61] the Third Circuit refused to apply *DelCostello* to allegations involving labor organization violations of the duty of fair representation with respect to the Employee Retirement Income Security Act.[62] The *Adams* Court said:

> Our reading of *DelCostello* is that it does not preclude the use of a different federal statutory period where the policies underlying

---

[59] It was precisely to have factual issues, including those concerning limitations, decided by a jury that a jury demand was filed in this case. (District Court Docket Sheet item 22.) The Memorandum makes no mention of this fact.

[60] *DelCostello*, 462 U.S. at 164.

[61] 739 F.2d 858 (3d Cir. 1984).

[62] 29 U.S.C. § 1001.

> the adoption of a six-month period in that case are inapplicable.[63]

More fundamentally, this Court's more recent decision in *Reed* confirms the correctness of the Third Circuit's analysis in *Adams*. The district court in *Reed* had been urged to apply *DelCostello*, but determined the case before it to be assimilable to a civil rights case, and applied the three-year limitations period found in state law.[64] This Court referred to "the narrow scope of the *DelCostello* exception to our standard borrowing rule."[65] The Court then held "analogous state statutes of limitations are to be used unless they frustrate or significantly interfere with federal policies."[66] Here, practical factors mentioned, the prime importance of vindicating employees' free speech and expression rights, and the preeminent "policy of voluntary unionism"[67] provide powerful demonstration that *Reed*, and not *DelCostello* should apply to employees' rights of free speech and expression under *Beck*, as well as § 101(a)(2) of the LMRDA.

---

[63] 739 F.2d at 867. Certiorari was denied in *Adams*, 469 U.S. 1122 (1985). Significantly, Justice White, joined by Justices Brennan and Powell, dissented from the denial of certiorari because of the implication that "the limitations period for a union's resolution of a wide variety of disputes *turns on the nature of the issue*, rather than the nature of the union's discharge of its duty of fair representation." 469 U.S. at 1123 (emphasis added).

[64] Here, the applicable limitations period would be that of Illinois, the locus of Fitz's discharge, or the District of Columbia, the forum. Section 13-205 of Illinois Annotated Statutes (Smith-Hurd 1984) provides a five-year limitations period for "civil actions not otherwise provided for." Section 12-301(8) of the District of Columbia Code (1981) provides a three-year limitations period in cases where "a limitation is not otherwise specifically prescribed." Applying either statute, Fitz's district court complaint was timely.

[65] *Reed*, 488 U.S. at 326.

[66] *Id.* at 320.

[67] *Pattern Makers' League v. NLRB*, 473 U.S. 95, 105 (1985).

CONCLUSION

The writ of certiorari requested should be granted in order that this Court can consider the proper limitations period to be applied to employees' free speech and expression rights under *Beck*. *Beck* claims, precisely because of the constitutional concerns they raise, warrant the same limitations period this Court applied to equivalent claims in *Reed*. Therefore, the instant petition raises an unanswered question of major significance and widespread application deserving of this Court's review.

Respectfully submitted,

HUGH L. REILLY
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

Attorney for Plaintiff

January 25, 1991

APPENDICES

APPENDIX A

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

October 30, 1990

NOT TO BE PUBLISHED - SEE LOCAL RULE 14

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5364 **September Term, 1990**

David L. Fitz,
Appellant

[Clerk's Stamp omitted in printing—Filed Oct. 30, 1990]

v.

Communications Workers of America, et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: Mikva, Edwards, and Silberman, Circuit Judges

JUDGMENT

This case was considered on appeal from the United States District Court for the District of Columbia and on the briefs filed by the parties and arguments by counsel. The arguments have been accorded full consideration by the court and occasion no need for a published opinion. *See* D.C. Cir. Rule 14(c).

Appellant challenges the District Court's Order dismissing his claims. Appellant had contended below that AT&T, by discharging him, and the CWA, by requesting his discharge, violated his rights under the First Amendment and the NLRA. In addition, appellant claimed that the General Counsel of the NLRB and her assistant violated his constitutional rights by not holding his charges in abeyance pending a Supreme Court decision as directed by an internal agency memorandum. For the

reasons discussed fully in Judge Lamberth's fine Memorandum Opinion, filed August 17, 1989, we find that these claims lack merit and were properly dismissed.

ORDERED and ADJUDGED that the Order dismissing appellant's claims is affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam
For the Court
/s/
Constance L. Dupre
Clerk

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX B

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

August 17, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID L. FITZ,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. 88-1214
v.	)	(RCL)
	)	
COMMUNICATIONS WORKERS OF AMERICA, et al.	)	**[Clerk's Stamp omitted in printing— Filed Aug. 17, 1989]**
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Plaintiff David L. Fitz brought this action following his discharge from employment by defendant American Telephone and Telegraph Company-Communications, Inc. (AT&T), and the subsequent dismissal of his claim filed with the National Labor Relations Board (NLRB). AT&T fired Fitz at the request of Communication Workers of America (CWA), with which it has a collective bargaining agreement. Fitz is not a member of CWA. Defendants are CWA, CWA Local 4251,[1] AT&T, Rosemary M. Collyer, individually and as General Counsel of the NLRB, and Ronald M. Slatkin, individually and as Acting Director of the Office of Appeals of the General Counsel's Office of the NLRB.

Plaintiff alleges that CWA threatened to dismiss him in the spring of 1986 because of Fitz's refusal to pay the dues-equivalent agency fee required of non-union members. In response to this threat, plaintiff claims that he requested certain information in order to determine the proportion of members' dues CWA spends for collective-bargaining related activities. Plaintiff alleges

---

[1]For purposes of this opinion, the court will refer to the national union and the local chapter collectively as CWA.

that neither CWA nor AT&T provided him with that information; rather, CWA demanded his discharge and AT&T complied. Plaintiff was fired on May 7, 1986.

Plaintiff filed charges with the NLRB on September 24, 1986; these charges were dismissed on November 26, 1986. Plaintiff filed an appeal with the NLRB on December 18, 1986, which was denied on January 20, 1987. Finally, plaintiff filed a motion for reconsideration on March 31, 1988, which was denied on April 20, 1988. Plaintiff filed this action on May 5, 1988.

Plaintiff alleges that the execution and enforcement of the collective bargaining agreement between CWA and AT&T, which resulted in his dismissal, violates "employees' rights to 'refrain' from collective action under LMRA [Labor Management Relations Act] § 7" and "coerce[s] association and speech and den[ies] procedural protections under the first amendment." Complaint, at 5. With respect to defendants CWA and AT&T, plaintiff requests declaratory judgment that the collective bargaining agreement violates his rights under the LMRA and the first amendment, and a permanent injunction to include reinstatement, the reduction of dues-equivalent fees to the demonstrated costs of collective bargaining, and the provision of the requested information regarding the determination of CWA's costs of collective bargaining. Plaintiff also demands damages for lost earnings, emotional distress, attorney's fees and costs.

Defendant Collyer was General Counsel of the NLRB, and defendant Slatkin is or was Acting Director of the Office of Appeals of the General Counsel's Office. Plaintiff alleges that these defendants intentionally and unlawfully gave his claim unfavorably disparate treatment, which resulted in the dismissal of plaintiff's claim, while all similar claims were held in abeyance pending the Supreme Court's decision in *Communications Workers of America v. Beck*, 108 S.Ct 2641 (1988). Plaintiff asserts that his claim was dismissed despite the existence of a memorandum from the General Counsel directing that all cases raising *Beck*-type issues should be referred to the Advice division

of the General Counsel's Office pending the *Beck* decision. Plaintiff's claim was never sent to Advice, but rather was sent to the Office of Appeals, which refused to issue a complaint. Such treatment, plaintiff claims, violated his first and fifth amendment rights, as well as his rights under the LMRA. Plaintiff requests declaratory judgment, lost earnings, emotional distress damages, attorney's fees and costs against Collyer and Slatkin, both in their official and personal capacities.

Defendants CWA and AT&T have moved separately to dismiss[2] the complaint on the grounds that plaintiff's first amendment claim fails for want of state action, and that plaintiff's statutory claim is time-barred.[3] Defendants Collyer and Slatkin have moved to dismiss for lack of jurisdiction, and, with respect to the claim against them in their individual capacities, on grounds of immunity.

I. Defendants CWA and AT&T

A. Plaintiff's First Amendment Claim

In *Beck*, the Supreme Court found that the exaction of dues from dissenting non-union employees pursuant to a collective-bargaining agreement, for purposes unrelated to collective bargaining, violates Section 8(a)(3) of the NLRA and the union's judicially-implied duty of fair representation. The Court declined to consider whether such exactions and expenditures violate the first amendment rights of objecting employees. *Beck*, at 2656-57.

---

[2]AT&T's motion is for a judgment on the pleadings dismissing this action, since AT&T had filed an answer.

[3]Both parties also argue that, to the extent plaintiff seeks only to allege an unfair labor practice claim under the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, (NLRA), the court does not have jurisdiction. Because the court treats plaintiff's claim as a hybrid claim under both Section 8(a)(3) of the NLRA and the judicially-implied duty of fair representation, the court has jurisdiction over the NLRA claim as a collateral issue. *Beck*, at 2647.

This court recently considered the first amendment question in *Abrams v. Communications Workers of America*, 702 F. Supp. 921 (D.D.C. 1988), aff'd without opinion, No. 88-7234 (D.C. Cir. July 13, 1989). In granting defendant's motion to dismiss plaintiffs' first amendment claim in *Abrams*, the court found that a collective bargaining agreement between a private employer and a private union did not involve state action. In so holding, the court relied on *Kolinske v. Lubbers*, 712 F.2d. 471 (D.C.Cir.1983). That case plainly held that "the authorization for agency shop clauses provided by NLRA § 8(a)(3) does not transform agency shop clauses into a right or privilege created by the state or one for whom the state is responsible." *Id.*, at 478. In the instant case, therefore, plaintiff's first amendment claim against CWA and AT&T must fail for want of state action.

B. Plaintiff's *Beck* Claim

Fitz alleges that he was dismissed on CWA's demand after requesting information regarding CWA'S collective bargaining costs, and refusing to pay dues-equivalent fees without being supplied with that information. Plaintiff claims that the collective bargaining agreement between CWA and AT&T, pursuant to which he was fired, violates his right to refrain from collective activity under Section 7 of the NLRA.[4] Section 7 provides that employees "shall have the right to refrain from" collective activities "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title." 29 U.S.C. 157. Section 8(a)(3), [29 U.S.C. 158(a)(3)] provides conditions under which a collective bargaining agreement may require employees to pay dues or fees to the union.

---

[4]In his oppositions to the motions to dismiss of both CWA and AT&T plaintiff also claims for the first time that the agreement violates § 302 of the Labor-Management Relations Act. This claim is not raised in the complaint, and therefore the court will not address it here.

Beck recognized that the exaction of agency shop fees for expenditures unrelated to collective bargaining is not authorized as an exception to Section 7 by Section 8(a)(3). Plaintiff's complaint is therefore best characterized as a *Beck*-type complaint.[5] Like *Beck*, the action is a hybrid suit—against AT&T for a violation of Section 8(a)(3) and against the union for breach of its judicially-implied duty of fair representation.

Defendants CWA and AT&T have moved to dismiss plaintiff's claim, arguing that the six-month statute of limitations provided in Section 10(b) of the National Labor Relations Act should apply to *Beck* claims. In *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Supreme Court found that the six-month statute of limitations provided in Section 10(b) applied to the hybrid Section 8(a)(3)/duty of fair representation claim in that case. The two cases consolidated in *DelCostello* did not involve *Beck*-type violations, but were similar to *Beck* in that they involved discharges or lay-offs of employees, allegedly in violation of the collective bargaining agreement and Section 8(a)(3). In both cases, the employees brought actions against both the employer, for breach of Section 8(a)(3), and the union, for breach of its duty to represent the employee fairly.

In deciding upon the six-month limitations period, the Supreme Court focused on the similarity between the hybrid action in that case and an action for unfair labor practices

---

[5]Plaintiff argues, in his Opposition to the Motion to Dismiss, that his case is not a *Beck* case *per se*, because he is not challenging the amount of dues exacted but rather his dismissal for refusing to pay them. In other words, plaintiff contends, he is not challenging the meaning of "dues" in Section 8(a)(3), which *Beck* addresses, but rather the "condition of employment" language of that section. This distinction is not material, however. Section 8(a)(3) explicitly permits an employer and a union to enter into an agreement requiring employees to become union members as a condition of continued employment. *Beck*, at 2648. Plaintiff's challenge, then, must go to the scope of this membership requirement, i.e., whether the dues required were authorized, not to the condition of employment language itself.

brought before the National Labor Relations Board, for which the six-month statute was designed. The Court noted that fair representation claims are treated as unfair labor practices by the NLRB. *DelCostello*, at 170. More importantly, the Court found a "close similarity of the considerations relevant to the choice of a limitations period." *Id.*, at 170-71. " 'In Section 10(b) of the NLRA'" the Court explained, "'Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employees' interest in setting aside what he views as an unjust settlement under the collective-bargaining system'" *Id.*, at 171, *quoting United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 70-71 (1981). In addition, the Court emphasized the need for national uniformity in the treatment of similar claims, and the need to avoid applying two different statutes of limitations to the two branches of the claim.

Plaintiff does not dispute that his claim was filed outside the six-month period. Rather, plaintiff argues that the three-year statute found in D.C. Code Ann. § 12-301 should apply. Plaintiff urges that a cause of action under *Beck* more closely resembles a claim under Section 101(a)(2) of the 1959 Labor-Management Reporting and Disclosure Act (LMRDA), which protects union members' free speech and assembly rights. In *Reed v. Transportation Union*, 109 S.Ct. 621 (1989), the Supreme Court distinguished *DelCostello* and found that the state statute of limitations for personal injury actions should be applied to causes of action under the LMRDA. The Court found that, unlike the hybrid NLRA/duty of fair representation claim in *DelCostello*, a claim under the LMRDA related primarily to internal union matters and only tangentially or remotely affected the interests in stable bargaining relationships and private dispute resolution at stake in *DelCostello*. *Reed*, at 4091. The Court focused on the core federal interest protected by Section 101(a)(2)—"to guarantee free speech and association rights in order to further union democracy", and found that the protection of this interest "simply had no part in the design of a statue of limitations for unfair labor practice charges." *Id.*, at 4092.

Although *Beck* does serve to protect a similar employee interest as that protected by the LMRDA, a claim under *Beck* is nevertheless more closely analogous to the claims in *DelCostello* than to that in *Reed*. The "free speech" concern of *Beck*, protecting the interests of nonmember employees, is more similar to an unfair labor practice claim based on membership status or dissident views—to which the Section 10(b) statute would apply—than to a claim under the LMRDA. Further, both *DelCostello* and the present case involve discharges pursuant to a collective bargaining agreement. Therefore, the primary concern of *DelCostello*, to balance the rights of employees and the national policy of private settlement of labor disputes, is identical in both cases. Moreover, because both *DelCostello* and the instant case raise hybrid claims, the *DelCostello* Court's interest in avoiding the application of two different statutes of limitations also applies. In sum, the court finds no valid reason to distinguish a Section 8(a)(3)/duty of fair representation *Beck* claim from the similar hybrid claim in *DelCostello*.

Lastly, plaintiff claims that the statute of limitations should be equitably tolled. In his opposition to CWA's motion, plaintiff argues that the statute is tolled by his filing of charges with the NLRB. Plaintiff urges that the date on which the statute began to run is April 20, 1988, when his motion for reconsideration was denied. As defendant points out, however, plaintiff's final appeal was denied on January 20, 1987, more than fifteen months prior to that date. And, regardless of which date is chosen, the law is clear that filing charges with the NLRB does not toll the limitations period on a fair representation claim. *Arriaga-Zaya v. Int'l Ladies Garment Workers Union*, 835 F.2d 11, 14 (1st Cir. 1987).

With respect to AT&T, Fitz asserts that the statute is tolled by certain actions of AT&T, or rather by its failure to act. Plaintiff alleges that AT&T failed to advise him of his rights under *Beck* prior to discharging him, did not defer the discharge pending the decision in *Beck*, and did not itself file an NLRB charge to forestall his dismissal. Plaintiff does not explain, however, how these failures to act, all of which occurred (or did not occur) prior to his discharge, toll the statute which began to

run upon his discharge. Since AT&T did nothing to forestall his discharge, surely plaintiff did not have reason to believe that it would act afterwards on his behalf. Relatedly, AT&T's acts cannot possibly be construed to support plaintiff's claim of estoppel. AT&T did nothing, before or after plaintiff's discharge, to lead him to believe the discharge was not final.

For the reasons stated above, plaintiff's claims against CWA and AT&T are time-barred and will be dismissed.

II. Defendants Collyer and Slatkin

Plaintiff sues defendants Collyer and Slatkin in both their official and personal capacities. Plaintiff argues that the dismissal of his claim by these defendants, in disregard of defendant Collyer's internal memorandum, violated his first and fifth amendment rights, and his rights under the NLRA. Defendants have moved to dismiss the action against them in their official capacities for lack of subject matter jurisdiction, and with respect to the *Bivens* action, on grounds of immunity.

A. Jurisdiction

Plaintiff cites four bases of jurisdiction: 28 U.S.C. § 1331 (general federal question jurisdiction); 28 U.S.C. § 1337 (jurisdiction over actions arising under an act of Congress regulating commerce); 28 U.S.C § 1346(a)(2) and (b) (Federal Tort Claims Act); and 5 U.S.C. § 552 (Administrative Procedure Act). As defendants correctly point out, the first two are only general grants of subject matter jurisdiction and may be limited or precluded by the specific statutory scheme of review found in the NLRA. *Louisville and Nashville & Co. v. Donovan*, 713 F.2d 1243, 245 (6th Cir. 1983), *cert. denied*, sub nom. *Seaboard System Railroad, Inc. v. Donovan*, 460 U.S. 936; *Board of Trustees of Memorial Hospital v. NLRB*, 523 F.2d 845, 846-47 (10th Cir. 1975). In order for this court to entertain this action, then, jurisdiction must be found in either the NLRA itself, the APA or the Federal Tort Claims Act.

1. *Jurisdiction under the NLRA*

Plaintiff concedes the indisputable: that decisions by the General Counsel not to issue an unfair labor practice complaint are not subject to judicial review. *NLRB v. United Food and Commercial Workers Union* (UFCWU), 108 S.Ct. 413, 422-23 (1987); *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 155 (1975); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Nonetheless, plaintiff seeks to avoid application of this rule in his case by urging the court to adopt one of two theories. First, plaintiff argues that he is not challenging the decision not to issue a complaint, a concededly prosecutorial function. Rather, according to plaintiff, he challenges a purely administrative act: the allegedly arbitrary disregard of Collyer's internal memorandum which allegedly required all claims such as his to be sent to the Office of Advice rather than the Office of Appeals, and there to be held in abeyance pending the Supreme Court's decision in *Beck*. As an administrative act, plaintiff argues, the decision is reviewable.

Plaintiff's second theory characterizes his claim as one for "unfavorably disparate treatment", violative of the fifth amendment. So stated, the claim arguably falls within the jurisdiction provided under *Webster v. Doe*, 108 S.Ct. 2047 (1988), which mandated district court review of agency actions which give rise to colorable constitutional claims, even where the action is otherwise unreviewable under the APA and the agency's enabling statute.

With respect to plaintiff's first argument, it is unclear that actions of the General Counsel are divisible into administrative, as opposed to prosecutorial, acts. Notably, the Office of the General Counsel was established in the first place in order to segregate the prosecutorial, nonreviewable, functions of the NLRB from its reviewable adjudicatory functions. *See NLRB v. UFCWU*, 108 S.Ct. at 421-22. The cases cited by plaintiff, holding that administrative acts of agencies may be reviewable even though its other actions are beyond the scope of review, involve clearly administrative acts, and none involves an act of the General Counsel. *See, Local 777 v. NLRB*, 603 F.2d 862, 882

(D.C. Cir 1977); *City of Santa Claus v. Andrus*, 472 F.2d 660, 669 n.5 (9th Cir. 1978); *Basic Media v. F.C.C.*, 559 F.2d 830, 833 n.2 (D.C. Cir. 1977); and *Cappadora v. Celebrezze*, 356 F.2d 1, 6 (2nd Cir. 1966).

Regardless of the applicability of this distinction to acts of the General Counsel, plaintiff has not shown any evidence that the treatment his claim received was administrative in nature, rather than prosecutorial. Plaintiff's attempt to segregate a distinct action or decision—not to send his claim to the Office of Advice—as the basis of his claim is meritless. This decision, whether or not it is labelled "administrative" is nonetheless one step in the enforcement process and cannot be logically separated from the overall decision. Indeed, the Court of Appeals for this circuit recently rejected this type of argument and reaffirmed the presumption of unreviewability of agency enforcement decisions established in *Heckler v. Chaney*, 470 U.S. 821 (1985). In *Safe Energy Coalition of Michigan, et al. v. U. S. Nuclear Regulatory Commission, et al.*, 866 F.2d 1473 (D.C. Cir. 1989) petitioners argued that their request that the NRC take certain actions was a request for a 'legal determination' on the applicability of a certain regulation rather than a request for an enforcement action. The Court found that "[w]hile the agency, as a logical matter, would have to answer this 'legal' question before it could determine whether to enforce the requirements of [the regulation] it would be untrue to *Chaney* for us to permit petitioners to evade the presumption of unreviewability by artificially carving out this antecedent legal issue." *Id.*, at 1476. *See also Gray v. Bell*, 712 F.2d 490, 515-16 (D.C.Cir. 1986) (holding that "the improper and tortious actions allegedly undertaken by the defendants are too intertwined with purely discretionary decisions of the prosecutors . . . there is no meaningful way in which the allegedly negligent acts could be considered apart from the totality of the prosecution.")

The enforcement process, as explained in *NLRB v. Sears, Roebuck & Co.*, *supra*, and *NLRB v. UFCWU*, *supra*, and as followed in the instant case, begins when a charging party files a complaint with the Regional Director of the NLRB. The

Regional Director, under authority delegated by the General Counsel, decides whether or not to issue a complaint. If he decides, as occurred here, not to issue a complaint, the charging party may appeal to the General Counsel. That appeal goes to the Office of Appeals where it is reviewed by the Appeals Committee, a decision is taken, and the decisions and the reason behind it are cleared through the General Counsel's office. The Appeals Committee includes the Director of the Office of Appeals, in this case defendant Slatkin. If the Regional Director's decision not to issue a complaint is sustained, the General Counsel sends a letter to the charging party briefly setting forth the reasons for the denial of his appeal. *Sears, Roebuck*, at 139-140. In order to formulate a more coherent policy, the General Counsel alternatively may require the Regional Directors, before reaching an initial decision in connection with charges raising issues specified by the General Counsel, to submit the matter to the General Counsel's "Advice Branch," located in Washington, D.C. Such cases are reviewed by a committee made up of various high-ranking members of the General Counsel's office, and the committee recommendation is sent to the General Counsel. The General Counsel decides the issue and her final determination is sent to the Regional Director. *Sears, Roebuck*, at 141-42.

Plaintiff does not dispute that his claim received the consideration mandated by the Act, and by the regulations promulgated under it. He argues only that the path through the Office of Appeals, rather than the Office of Advice, resulted in an unfair treatment of his claim. Clearly, however, both paths lead through the General Counsel's Office, and plaintiff does not dispute that his claim was considered by the General Counsel. Thus, in the end, the decision maker was the same.

The General Counsel is the "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d). The decision of the General Counsel to issue or not to issue a complaint need not be based on the particular merits of an individual's claim. A

charging individual must persuade the General Counsel of the merits of his complaint, but the General Counsel may still decline to issue a complaint for any number of reasons, including ones of policy or administrative consideration. That decision is not subject to review. *NLRB v. UFCWU, supra.*

Plaintiff's second argument, that the disparate treatment of his claim presents a colorable constitutional claim under the fifth amendment, also fails. In *Webster v. Doe*, 108 S.Ct. 2047 (1988), the Supreme Court appears to have stated the principle that a district court must review agency actions which give rise to colorable constitutional claims even where the action is otherwise unreviewable under the APA and the agency's enabling statute. *Webster*, in which respondent challenged an alleged CIA policy against employing homosexuals, did not address whether such an assertion presented a colorable constitutional claim, however. *Id.*, at 2054, n.9. In the instant case, even assuming that the *Webster* rule applies to the General Counsel's treatment of complaints,[6] the court does not find that Fitz has presented a colorable constitutional claim.

Even if, *arguendo*, the court accepts that Fitz's claim is within the class of claims covered by Collyer's instruction, and therefore should have been held pending *Beck*, its disparate treatment alone does not give rise to a constitutional claim. The " 'conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification' " *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) *quoting Oyles v. Boles*, 368 U.S. 448, 456 (1961). Fitz has not set forth any facts alleging, or even

---

[6]*Cf. Rex H. Reed v. Collyer*, 108 S.Ct. 2885 (1988) denying certiorari on a claim alleging that the dismissal of an unfair labor practice charge violated due process and equal protection rights under the fifth amendment. Justice Scalia, dissenting, argued that *Reed* presented the perfect vehicle for application of the of *Webster* exception.

suggesting that his complaint was dismissed for any invidious reason.[7]

2. *APA Jurisdiction*

Plaintiff argues that review may be had directly under the APA because 1) the complained of action is administrative rather than prosecutorial, and 2) the Collyer memorandum constitutes "law to apply" sufficient to remove the act from the area of nonreviewable agency discretion. As discussed above, the court finds no merit in the first of these contentions. Moreover, both of these arguments are irrelevant.

In *NLRB v. UFCWU, supra*, the Supreme Court rejected respondent's argument that prosecutorial decision of the General Counsel were reviewable as final agency actions. The Court noted that "review under the APA is unavailable of actions specified in 5 U.S.C. § 701(a), that is, (1) where 'statutes preclude judicial review;' or (2) where 'agency action is committed to agency discretion by law.'" *Id.*, at 425. Plaintiff, directing his arguments to the second of these categories, attempts to persuade the court that the decision to dismiss his complaint is reviewable because it is not *discretionary*.

The discretionary nature of the act is irrelevant, however. In *UFCWU*, the Court found that the first section quoted above

---

[7]Rather, plaintiff rejects the reasons for the dismissal set forth by the agency (see Defendant's Attachments C, E and G, comprising the agency record of the case) and requests discovery as to the "true facts" surrounding defendants' actions. In support of this request, plaintiff's counsel has submitted a Rule 56(f) affidavit, which merely sets forth a number of statements by defendants which plaintiff claims are erroneous, and requests discovery so that plaintiff may determine the reasons for the errors. The purpose of Rule 56(f) is to allow a party to survive a summary judgment motion "if he presents valid reasons justifying his failure of proof." *Wallace v. Brownell Pontiac-GMC Co.*, 703 F.2d 525, 527 (5th Cir. 1983). Plaintiff's counsel here has not only failed to present reasons justifying his failure of proof, but has failed to set forth what he is attempting to prove. Accordingly, plaintiff's request for discovery will be denied.

applied to acts of the General Counsel, that is, that review is precluded by statute. Having found that Congress purposely excluded prosecutorial decisions from review under the NLRA, the Court stated that "it would be illogical in the extreme to hold that Congress did so only to permit review under the APA." *UFCWU*, at 425. In the instant case, the court has found that the General Counsel's "administrative" decision is inseparable from her prosecutorial role, and is therefore unreviewable under the NLRA. Because review is precluded by statute, it is likewise unavailable under the APA.

3. *FTCA Jurisdiction*

Plaintiff's final basis of jurisdiction, is the Federal Tort Claims Act, 28 U.S.C. § 1346(a)(2) and (b). Section 1346(a)(2), however, does not create a substantive right to recover money damages against the United States. *United States v. Mitchell*, 463 U.S. 206, 216 (1982). Rather, the substantive right must be found in some other source of law. *Id.* Plaintiff's potential sources of law—the NLRA and the first and fifth amendments—do not provide such rights. *See I.A.M. v. Lubbers*, 681 F.2d 598, 604-05 (9th Cir. 1982) (no right to have unfair labor practice complaint issue); *Clark v. Library of Congress*, 770 F.2d 89, 103-04 & n.31 (D.C. Cir. 1984) (jurisdiction under the "founded upon the Constitution" grant of the FTCA limited to claims under the "taking clause" of the fifth amendment).

Jurisdiction under Section 1346(b) is limited by the exceptions set forth in 28 U.S.C. 2671-2680, in particular by the "discretionary function" exception contained in Section 2680.[8]

---

[8]Section 2680 provides in pertinent part:

> The provisions of this chapter and Section 346(b) shall not apply to—(a) any claim based upon an act or omission of an employee of the Government, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Having concluded that the function at issue here is prosecutorial in nature, and that Congress intended no review of the General Counsel's prosecutorial function under the NLRA, the court would be hard pressed to find that Congress intended in the FTCA to waive sovereign immunity and allow suits based on the exercise of that function. Indeed, "[p]rosecutorial decisions as to whether, when and against whom to initiate prosecution are quintessential examples of governmental discretion in enforcing the criminal law, and, accordingly, courts have uniformly found them to be immune under the discretionary function exception." *Gray v. Bell*, 712 F.2d at 490.

The court concludes that it lacks jurisdiction to review the complained-of action under the NLRA, the APA or the FTCA. The action against defendants Collyer and Slatkin in their official capacities will therefore be dismissed.

B. *Official Immunity*

Lastly, plaintiff sues Collyer and Slatkin in their individual capacities, seeking declaratory relief and damages from them pursuant to *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971).[9] Defendants argue that the acts which gave rise to plaintiff's claim are protected by absolute, or in the alternative, qualified immunity.

1. *Absolute immunity*

Plaintiff does not seriously contest the arguments of defendants Collyer and Slatkin as to absolute immunity. Rather, plaintiff relies on his distinction, discussed above, between "prosecutorial" and "administrative" acts of the General Counsel.

---

[9]Despite plaintiff's arguments to the contrary, he does not seek prospective injunctive relief from defendants. Plaintiffs' contention that immunity defenses are not available in actions for injunctive relief is therefore irrelevant.

As discussed above, the court does not find plaintiff's prosecutorial/administrative distinction to be a tenable one in this case.

Having concluded that the act was prosecutorial, the court finds that it comes squarely within the scope of immunity defined in *Butz v. Economou*, 438 U.S. 478 (1977). In *Butz*, the Court held that "agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts." *Id.*, at 515. The *Butz* Court found that officials in the Department of Agriculture "who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision." *Id.*, at 516.

There is no reasonable distinction between the instant case and *Butz*. Both cases involve potential liability for highly discretionary decisions concerning whether or not to initiate enforcement proceedings.[10] Indeed, the discretionary nature of the power entrusted to the General Counsel is highlighted by the fact that Congress made that power unreviewable by the courts.

Plaintiff, moreover, misperceives the role of the General Counsel in a most fundamental way. Plaintiff first states that Collyer's position is not analogous to a criminal prosecutor because the latter's decision has no effect upon civil remedies. Plaintiff goes on to argue that "[s]erious and substantial constitutional questions would be presented if she could on whimsy deny valid claims a forum." Opposition at 6, and n.6. Plaintiff is mistaken, and the General Counsel is exactly analogous to a criminal prosecutor for the very reason plaintiff points out. The General Counsel, like a prosecutor, does not represent solely the

---

[10]Although the *Butz* Court thought it "unlikely" that a plaintiff would seek damages for a decision *not* to authorize an enforcement proceeding, the Court did not suggest that the same considerations would not apply. *Butz*, at 515. Moreover, in *Simons v. Billinger*, 643 F.2d 774, 780 (D. C. Cir. 1980), the D.C. Circuit held that the decision not to prosecute was equally protected.

victim of the alleged wrong. Plaintiff, at least in this action, remained free to bring suit independently in this court, had he done so within the limitations period. Even where recourse is solely to the NLRB, however, the General Counsel is not charged with enforcing the rights of individual employees, and employees have no right to have a complaint issue. Rather, the General Counsel is charged with the responsibility of enforcing the labor laws with the end of maintaining the labor peace, exactly as a criminal prosecutor prosecutes, in her discretion, in order to maintain the social peace. In both cases the legal interest in the prosecutor's decision has been, for better or worse, appropriated by the state.[11]

2. *Qualified immunity*

Even were the court to reject the claim of defendants Collyer and Slatkin to absolute immunity, these defendants are entitled to qualified immunity for the complained-of acts—even were the court to find these acts purely administrative. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court held that federal officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*, at 818. Thus, even if these defendants violated the submissions instruction, they violated no clearly established statutory right. Plaintiff has neither a right to have a complaint issue, or a right to have his complaint sent to Advice. Defendants' alleged transgression, moreover, does not in itself

---

[11]Indeed, to allow plaintiff to sue the General Counsel in the instant case would be analogous to allowing a victim of crime to sue a prosecutor for failure to prosecute—admittedly not the situation for which the doctrine of immunity was devised, but one from which a prosecutor is equally entitled to be immune. For these reasons, the court finds that no *Bivens* remedy should exist against the General Counsel. In enacting the NLRA, Congress has clearly chosen a balance of rights which leaves individual employees with less than complete relief for every perceived injury. In such circumstances, courts have refused to allow a *Bivens* remedy. *See Schweiker v. Chilicky*, 108 S.Ct. 2460 (1988); *Bush v. Lucas*, 462 U.S. 367 (1983).

amount to a constitutional violation, absent some invidious reason for the action. Plaintiff has suggested no such reason.

* * * *

For the above-stated reasons, the motions to dismiss of defendants CWA, AT&T, Collyer and Slatkin will be granted, and the case will be dismissed.

SO ORDERED.

/s/
Royce C. Lamberth
United States District Judge

DATE: AUG 17 1989

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

August 17, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID L. FITZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 88-1214
COMMUNICATIONS WORKERS OF AMERICA, et al.,	)	(RCL)
	)	
	)	**[Clerk's Stamp omitted in printing–Filed Aug. 17, 1989]**
Defendants.	)	

ORDER

This matter is before the court on the Motions to Dismiss of defendants Communication Workers of America (CWA) and Local 4251, the Motion for Judgment on the Pleadings of defendant American Telephone and Telegraph Company-Communications, Inc. (AT&T), and the Motion to Dismiss of defendants Rosemary Collyer and Ronald Slatkin. Upon consideration of these motions, plaintiff's oppositions and defendants' replies, it is, for the reasons stated in the accompanying memorandum opinion, hereby ordered:

1. The Motion to Dismiss of CWA and Local 4251 is GRANTED.

2. The Motion for Judgment on the Pleadings of AT&T is GRANTED.

3. The Motion to Dismiss of Rosemary Collyer and Ronald Slatkin is GRANTED.

4. Plaintiff's request for discovery pursuant to Fed. R. Civ. P. 56(f) is DENIED.

This case now stands DISMISSED WITH PREJUDICE.

SO ORDERED.

/s/
Royce C. Lamberth
United States District Judge

DATE: AUG 17 1989

APPENDIX D

COMPLAINT FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

May 5, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID L. FITZ
760 Otto Road
Roscoe, Illinois 61073

[Clerk's Stamp omitted in printing]

Plaintiff,

v.

COMMUNICATIONS WORKERS OF AMERICA

Serve: Morton Bahr, President
1925 K Street, N.W.
Washington, DC

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 425,

Serve: Morton Bahr, Agent
1925 K Street, N.W.
Washington, DC

AMERICAN TELEPHONE & TELEGRAPH-
COMMUNICATIONS, INC.
(A body corporate)

Serve: CT Corporation Systems
1030 15th St., N.W.
D.C. 20005

ROSEMARY COLLYER, individually
and as General Counsel of
the National Labor Relations Board
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570

RONALD L. SLATKIN, individually
and as Acting Director of the
Office of Appeals of the
General Counsel of the National
Labor Relations Board
1717 Pennsylvania, Ave., N.W.
Washington, D.C. 20570

COMPLAINT
(Civil Rights)

Jurisdiction

(1) This Honorable Court has jurisdiction over these proceedings on the basis of:

(A) 28 U.S.C. § 1331;

(B) 28 U.S.C. § 1337;

(C) 28 U.S.C. § 1346(a)(2) & (b); and

(D) 5 U.S.C. § 552.

Parties

(1) The plaintiff, David L. Fitz (Plaintiff), is a citizen of the United States, a resident of the state of Illinois, and, at all times relevant herein, an "employee" in interstate commerce as defined in the Labor-Management Relations Act (LMRA), 29 U.S.C. § 152(3), but not a member of the defendants CWA, described below.

(2) The defendants, Communications Workers of America and its Local 425 (collectively CWA), are a "labor organization" in interstate commerce as defined in the LMRA, 29 U.S.C. § 152(5).

(3) The defendant, American Telephone and Telegraph Company-Communications, Inc. (ATT), is a body corporate, incorporated under the laws of the state of Delaware and an "employer" in interstate commerce as defined in the LMRA, 29 U.S.C. § 152(2).

(4) The defendant, Rosemary Collyer (Defendant Collyer), is the General Counsel of the National Labor Relations Board, an agency of the United States with powers set forth in the LMRA, § 153(d), as limited by the Constitution of the United States. She is sued individually and in her official capacity.

(5) The defendant, Ronald L. Slatkin (Defendant Slatkin), is Acting Director of the Office of Appeals of the General Counsel of the National Labor Relations Board, an agency of the United States with powers set forth in the LMRA, 29 U.S.C. § 153(d), as limited by the Constitution of the United States. He is sued individually and in his official capacity.

Facts

(6) Plaintiff Fitz, at all relevant times, was an employee of ATT. His employment began on May 1, 1967; it was terminated on May 7, 1986, after 19 years of service.

(7) ATT and its predecessor companies have collective bargaining relationships with CWA. Those relationships were undertaken, and are maintained, under color of the LMRA, 29 U.S.C. § 159. Pursuant to those relationships, ATT and CWA have entered into and enforce collective bargaining agreements. Included in those collective bargaining agreements are provisions which, on their face, require employees, such as Plaintiff Fitz, to pay CWA monetary amounts equal to the dues of CWA's voluntary members or suffer discharge. Those provisions are entered into and enforced under color of the LMRA, 29 U.S.C. § 158(a)(3).

(8) In the Spring of 1986, CWA threatened to seek Mr. Fitz's discharge from employment for declining to pay the dues-

equivalent fee. In response, Plaintiff Fitz requested from CWA and ATT certain information in order to determine the proportion of members' dues CWA spends on collective bargaining, contract administration and grievance adjustment (collective bargaining). Neither CWA nor ATT furnished him with that information. Nevertheless, CWA demanded his discharge and ATT met that demand; Plaintiff Fitz was discharged from employment on May 7, 1986.

(9) Following his discharge, Plaintiff Fitz sought relief through the National Labor Relations Board (NLRB), by filing charges with the appropriate NLRB Regional Director, a subordinate to Defendant Collyer, on September 24, 1986; his charges were dismissed by the Regional Director, acting for Defendant Collyer, on November 26, 1986. An appeal was filed with Defendant Collyer's Office of Appeals on December 18, 1986. The appeal was denied by the Defendant Slatkin, Acting Director of the Office of Appeals, acting for Defendant Collyer.

(10) Defendant Collyer's dismissal of the charges, and the denial of the appeal by Defendants Collyer and Slatkin, occurred *after* Defendant Collyer issued a Memorandum on November 24, 1986, requiring that all charges, like that of Plaintiff, concerning "use of union-security moneys for 'non-representative' purposes" be submitted mandatorily to the Advice Division. As a practical matter, those cases have been held in abeyance ("iced") pending the decision of the United States Supreme Court in *Communications Workers v. Beck, cert. granted*, 107 S. Ct. 2480, argued, 56 U.S.L.W. 3515 (U.S. Jan. 11, 1988) (No. 86-637). A motion for reconsideration, dated March 31, 1988, specificaliy called the attention of Defendants Collyer and Slatkin to that memorandum and the unfavorably disparate treatment Mr. Fitz's charges received when compared to indistinguishable charges filed by others. The motion was denied on grounds that assertion of the issuance of Defendant Collyer's own memorandum is not equivalent to providing "newly discovered evidence."

Count I
(CWA and ATT)

I

(11) Under the LMRA and the first amendment to the Constitution of the United States, CWA and ATT had the obligation not to execute and not to enforce agreements which violate employees' rights to "refrain" from collective action under LMRA § 7, or which coerce association and speech and deny procedural protections in violation of the first amendment. Despite these statutory and constitutional obligations, defendants CWA and ATT intentionally entered into and enforce agreements in violation of employees' right to refrain under the LMRA, and in violation of employees' rights to free association and speech and to procedural protections under the first amendment. They have done so against Plaintiff Fitz by, in the case of CWA, demanding his discharge for the exercise of those rights and without providing the information and procedural protections required by the first amendment. ATT has done so by discharging Plaintiff Fitz from employment, on CWA's demand, for his exercise of those statutory and first amendment rights and without itself either providing the information and procedure protections required by the first amendment or ensuring that CWA provided them.

(12) Those actions and defaults of Defendants CWA and ATT violate Plaintiff Fitz's first amendment and LMRA rights, causing him loss of earnings and emotional distress and other injuries and damages which defendants knew or should have known would result from their conduct.

II

(Collyer and Slatkin)

(13) As federal officials, Defendants Collyer and Slatkin have the obligation under the fifth amendment to the constitution to treat essentially indistinguishable charges in the same way. In all other known cases raising the same issues as the charges presented by Plaintiff Fitz, Defendant Collyer has held the case in abeyance pending the decision of the Supreme Court in *Beck*, *supra*. These cases were "iced" under the authority of Defendant Collyer's memorandum of November 24, 1986. Defendants Collyer and Slatkin were obligated to consistently apply the requirements of that memorandum in handling Plaintiff Fitz's charges but did not do so. The memorandum and its application have protected other employees from the discharge from employment that Plaintiff Fitz suffered due to Defendant Collyer's and Defendant Slatkin's intentional and unlawfully disparate treatment. Plaintiff Fitz's charges were dismissed, his appeal denied, and his motion for reconsideration denied after issuance of that memorandum and without a compelling or even merely rational governmental interest to sustain those actions in violation of the fifth amendment. Thus, judicial action is the only means to achieve effective relief.

(14) Those actions and defaults of Defendants Collyer and Slatkin violate Plaintiff Fitz's first and fifth amendment and LMRA rights, causing him loss of earnings and emotional distress and other injuries and damages which defendants knew or should have known would result from their conduct.

PRAYERS FOR RELIEF

Wherefore, the plaintiff, David Fitz, prays for:

(A) a declaratory judgment pursuant to 28 U.S.C. § 2201 which:

(1) states that the agreement of CWA and ATT on its face and as applied violates the rights of the plaintiff, David Fitz:

(a) to "refrain" from supporting CWA's activities other than collective bargaining on his behalf with ATT from which he is shown to benefit under § 7 of the LMRA;

(b) to be free from forced association for which there is no compelling governmental necessity or rational basis under the first amendment; and

(c) to procedural protections under § 7 of the LMRA and the first amendment ensuring that he is not forced to subsidize, even temporarily, CWA's activities other than collective bargaining on his behalf with ATT from which he is shown to benefit;

(2) states that Defendants Collyer and Slatkin have violated his rights under the LMRA, the first and fifth amendments, *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), and the Tort Claims Act:

(a) by dismissing his charges and denying his appeal and reconsideration, thereby refusing to adhere to Defendant Collyer's memorandum and practices thereunder;

(b) by denying him the National Labor Relations Board as a forum for the vindication of his rights on grounds that are arbitrary and nonrational when compared to the rationales and treatment of other indistinguishable cases.

(B) a mandatory injunction as to CWA and ATT, which requires that:

(1) Plaintiff Fitz be reinstated to the position he held immediately prior to discharge or its exact equivalent, including attendant benefits;

(2) CWA and ATT excise the dues-equivalent payment requirement from the face of the agency shop provisions of the agreement;

(3) they demand no greater payment from Plaintiff Fitz than CWA's demonstrated costs of collective bargaining on his behalf with ATT from which he is shown to benefit;

(4) they provide Plaintiff Fitz with the constitutionally required informational and procedural protections in the determination of CWA's costs of collective bargaining on his behalf with ATT from which he is shown to benefit.

(C) damages from all defendants for:

(1) lost earnings and other compensation-related benefits to which he would be entitled but for his discharge and lack of an NLRB forum, including interest from the date(s) upon which compensation and other benefits would have been due or accrued;

(2) emotional distress;

(3) attorneys fees; and

(4) costs of this suit.

/s/
Hugh L. Reilly, Bar No. 137612

/s/
Raymond J. LaJeunesse, Bar No. 124958
Counsel for Plaintiffs
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Dated: 5/5/1988

APPENDIX E

ANSWER TO COMPLAINT FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

July 1, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID L. FITZ, Plaintiff, vs. COMMUNICATIONS WORKERS OF AMERICA, *et al.*, AND AMERICAN TELEPHONE AND TELEGRAPH COMMUNICATIONS, INC., Defendants.	Civil Action No. 88-1214 Lambert, J.

ANSWER TO COMPLAINT

Comes now AT&T Communications, Inc. (hereinafter referred to as "AT&T" or "Defendant AT&T"), through undersigned counsel, and makes answer to the Complaint in this matter as follows:

JURISDICTION

1. Defendant AT&T admits that plaintiff purports to bring a claim under the statute cited, but denies that the complaint states any claim under these statutes or that these statutes give this Court jurisdiction in this matter.

PARTIES

1. Defendant AT&T admits that from January 1, 1984 to May 7, 1986 plaintiff was an employee of AT&T Communica-

tions, and was an "employee" within the meaning of 29 U.S.C. § 152(3).

2. Defendant AT&T admits the allegations contained in Paragraph 2.

3. Defendant AT&T admits the allegations contained in Paragraph 3.

4. Defendant AT&T admits that Rosemary Collyer is the General Counsel of the National Labor Relations Board.

5. Defendant AT&T is without sufficient information to form a belief as to the truth of the allegations of this paragraph.

FACTS

6. Defendant AT&T denies the allegation of Paragraph 6 except to admit that from January 1, 1984 through May 7, 1986, plaintiff was an employee of AT&T Communications and that prior to that date plaintiff was employed by Illinois Bell Telephone Company.

7. Defendant AT&T admits that at all times material it has been a party to and bound by a collective bargaining agreement with the CWA covering a unit of employees which included the plaintiff. That contract is the best evidence of its terms. Defendant AT&T denies the remaining allegations of Paragraph 7.

8. Defendant AT&T admits that on or about April 1, 1986 it received a request from CWA to terminate David L. Fitz. Defendant AT&T further admits that on or about May 7, 1986, it terminated the employment of plaintiff. Defendant AT&T is without information sufficient to form a belief as to the truth of the allegations of this paragraph directed to defendant CWA and denies the remaining allegations of this paragraph directed to defendant AT&T.

9. Defendant AT&T admits that on or about October 29, 1986, plaintiff filed unfair labor practice charges against AT&T Communications and Local 4251 of the CWA, that these charges were dismissed by the Regional Director on or about November 26, 1986, and that plaintiff's appeal of the Regional Director's dismissal was denied by letter dated November 26, 1986. Defendant AT&T denies the remaining allegations contained in Paragraph 9.

10. Defendant AT&T is without sufficient information to form a belief as to the truth of the allegations contained in Paragraph 10 except to admit that on or about March 31, 1988, plaintiff filed a motion for reconsideration with the NLRB's office of General Counsel and that that motion was denied.

COUNT I

(CWA AND AT&T)

11. Defendant AT&T denies the allegations contained in Paragraph 11.

12. Defendant AT&T denies the allegations contained in Paragraph 12.

COUNT 2

(Collyer and Slatkin).

13. The allegations contained in this paragraph are not directed to defendant AT&T and therefore no answer is required by this defendant. However, to the extent any of the allegations can be directed to AT&T, AT&T denies the allegations contained in this paragraph.

14. The allegations contained in this paragraph are not directed to defendant AT&T and therefore no answer is required by this defendant. However, to the extent any of the allegations

can be directed to AT&T, AT&T denies the allegations contained in this paragraph.

15. All allegations not heretofore admitted or denied are denied.

FIRST AFFIRMATIVE DEFENSE

The complaint in this matter is barred in whole or in part by the Statute of Limitations.

SECOND AFFIRMATIVE DEFENSE

The complaint in this matter fails to state a claim for which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims under the LMRA are preempted.

Respectfully submitted this 1 day of July, 1988.

/s/
John H. Curley
One Speedwell Avenue
P.O. Box 1954
Morristown, NJ 07960-1954
(201) 898-2501

/s/
Christopher H. Mills
D.C. Bar No. 936179
One Speedwell Avenue
P.O. Box 1954
Morristown, NJ 07960-1954
(201) 898-2510

APPENDIX F

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID L. FITZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 88-1214 RCL
COMMUNICATIONS WORKERS OF AMERICA, et al.,	)	
	)	
	)	
Defendants.	)	
	)	
	)	

MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM

Pursuant to Rule 12(b)(6), Fed.R.Civ.P., defendants Communications Workers of America (CWA) and CWA Local 4251 move to dismiss the complaint in this case on the grounds that it fails to state a claim upon which relief can be granted. In

support of this motion, the defendants rely upon the complaint and the Statement of Points and Authorities accompanying this motion.

Respectfully submitted,

/s/

James B. Coppess
D.C. Bar #347427
1925 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 728-2456

Attorney for defendants
Communications Workers of
America and CWA Local 4251

APPENDIX G

MOTION FOR JUDGMENT ON THE PLEADINGS FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID L. FITZ, Plaintiff,	)	
v.	)	Civil Action No. 88-1214 RCL
COMMUNICATIONS WORKERS OF AMERICA, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 4251 AMERICAN TELEPHONE & TELEGRAPH-COMMUNICATIONS INC. (A Body Corporate); ROSEMARY M. COLLYER, individually and as General Counsel of the National Labor Relations Board and RONALD M. SLATKIN individually and as Acting Director of the Office of Appeals of the General Counsel of the National Labor Relations Board, Defendants,	)	

MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Rule 12(c), Fed.R.Civ.P., defendant, AT&T, moves for judgment on the pleadings in this case on the grounds that the complaint fails to state a claim upon which relief can be granted. In support of this motion, the defendant relies upon the

complaint and the Statement of Points and Authorities accompanying this motion.

Respectfully submitted,

/s/
John H. Curley
One Speedwell Avenue
P.O. Box 1954
Morristown, NJ 07962-1954
(201) 898-2501

/s/
Christopher H. Mills
D.C. Bar No. 936179
Corporate Park III
580 Howard Avenue
Somerset, NJ 08873
(201) 560-7100

Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

No. 90-1197

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DAVID L. FITZ,
Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

JOHN H. CURLEY
Room 1107 E
1 Speedwell Avenue
Morristown, NJ 07960
Attorney for AT&T Communications, Inc.

JAMES B. COPPESS
Suite 411
1925 K Street, N.W.
Washington, D.C. 20006

LAURENCE GOLD
(Counsel of Record)
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for the Communications Workers of America

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT	5
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page

Abrams v. Communications Workers of America, 702 F.Supp. 920 (D.D.C. 1988), *aff'd mem.*, 848 F.2d 628 (D.C. Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 540 (1989) 3, 9
Adams v. Gould Inc., 739 F.2d 858 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985) 7
Communications Workers v. Beck, 487 U.S. 735 (1988) 3, 5
DelCostello v. Teamsters, 462 U.S. 151 (1983) 5, 6, 7
Eatz v. I.B.E.W. Local 3, 794 F.2d 29 (2d Cir. 1986) 7
Erkins v. Steelworkers, 723 F.2d 837 (11th Cir.), *cert. denied*, 467 U.S. 1243 (1984) 7
Kalombo v. Hughes Market, Inc., 886 F.2d 258 (9th Cir. 1989) 7
Pattern Makers v. NLRB, 473 U.S. 95 (1985) 8
Price v. International Union, U.A.W., 722 F.Supp. 933 (D.Conn. 1989), *appeal pending*, No. 90-7652 (2d Cir.) 9
Reed v. United Transportation Union, 488 U.S. 319 (1989) 7, 8
Richardson v. Steelworkers, 864 F.2d 1162 (5th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 2204 (1990) 7
San Francisco Arts & Athletics v. United States Olympic Committee, 483 U.S. 522 (1987) 9

STATUTES AND RULES

29 U.S.C. § 157 3
29 U.S.C. § 158 5
29 U.S.C. § 158(a) 6
29 U.S.C. § 158(a)(3) 5, 6
29 U.S.C. § 158(b)(1) 8
29 U.S.C. § 158(b)(2) 6
29 U.S.C. § 160(b) 4, 5, 6, 7, 8
29 U.S.C. § 411(a)(2) 7
Supreme Court Rule 14.1 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1197

DAVID L. FITZ,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. This case arises out of AT&T Communications, Inc.'s May 1986 discharge of David Fitz from employment. Pet. App. 4a. The basis for the discharge was Mr. Fitz's refusal to make the agency fee payments required as a condition of employment by the collective bargaining agreement between AT&T and the Communications Workers of America (CWA or Union) covering the bargaining unit in which Mr. Fitz worked. Pet. App. 3a. Mr. Fitz's stated reason for refusing to pay agency fees to the CWA is that he believed that the CWA had not given sufficient

support to a strike by the International Brotherhood of Electrical Workers that occurred while Mr. Fitz belonged to that union. Pet. 4 n. 3. AT&T's actions in this regard were at the request of CWA, which was suffering the loss of the contractual protections contained in the collective bargaining agreement by reason of Mr. Fitz's refusal to make the required agency fee payments.

2. In October 1986, an attorney representing Mr. Fitz filed charges with the National Labor Relations Board (NLRB) against AT&T and CWA Local 4251 alleging that the discharge constituted an unfair labor practice under the National Labor Relations Act (NLRA). D.C. Cir. App. 18-19.[1] In November 1986, the Director for NLRB Region 33 determined that the charges lacked merit. D.C. Cir. App. 20. The Regional Director found that the Union had met its legal obligations by notifying Mr. Fitz of the amounts owed and giving him a reasonable opportunity to pay those amounts, and that Local 4251 had not breached its duty of fair representation by refusing to file a grievance over Mr. Fitz's discharge. D.C. Cir. App. 20-21.

In December 1986, Mr. Fitz's attorney appealed the Regional Director's decision to the General Counsel of the NLRB. D.C. Cir. App. 23-37. In January 1987, the General Counsel, acting through her Office of Appeals, sustained the Regional Director's decision to dismiss the charges. D.C. Cir. App. 38-39. In this regard, the General Counsel found that "the evidence indicated that the Union advised Fitz of his obligations and that he admittedly did not respond to the Union's December 1985 letter on this matter or pay the required dues or its equivalent." D.C. Cir. App. 38. Responding to the contention that forms the basis of Mr. Fitz's claims in the instant case, the General Counsel further explained that "the evidence did not indicate that [Mr. Fitz] advised the

---

[1] Citations in the form "D.C. Cir. App." are to the appendix in the court of appeals.

Union of [any] objections" to the payment of full union dues. D.C. Cir. App. 38-39.[2]

More than a year later, in March 1988, a second attorney appeared for Mr. Fitz, and requested that the NLRB's General Counsel reconsider her decision sustaining the Regional Director's dismissal of the unfair labor practice charges. D.C. Cir. App. 40-42. In April 1988, the General Counsel denied this request as untimely under the Board's regulations. D.C. Cir. App. 43-44.

3. In May 1988, two years after his discharge, Mr. Fitz filed the instant lawsuit in the United States District Court for the District of Columbia. Pet. App. D. The complaint alleges that AT&T, by discharging Mr. Fitz, and CWA, by requesting his discharge, violated his rights under the First Amendment and under § 7 of the NLRA. Pet. App. 27a. The complaint also alleges that the NLRB's General Counsel and her assistant violated Mr. Fitz's statutory and constitutional rights by not holding his charge in abeyance pending this Court's decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988). Pet. App. 28a.

On August 17, 1989, the district court (Lamberth, J.) entered an order dismissing Mr. Fitz's complaint with

---

[2] At the time of Mr. Fitz's discharge, CWA maintained a procedure whereby employees paying agency fees could object to providing financial support to the Union's "nonrepresentational" activities, and receive a pro rata refund for nonrepresentational expenditures after the Union's books were audited. Part of the objecting employee's fee was held in escrow until the refund was paid and any challenge to the amount of the refund completed. The Union has since adopted a system of providing objecting fee payers an *advance reduction* of their fee payments. *See Abrams v. Communications Workers of America*, 702 F.Supp. 920, 923-924 (D.D.C. 1988), *aff'd mem.*, 884 F.2d 628 (D.C. Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 540 (1989). *See also Abrams v. Communications Workers of America*, D.C. Cir. No. 88-7234, Appendix to Brief of Appellant pp. 62-90 (describing CWA's objection procedure). Mr. Fitz has not alleged that he invoked the Union's objection procedure.

prejudice. Pet. App. 21a-22a. The district court ruled that the constitutional claims against CWA and AT&T failed because the administration of a collective bargaining agreement between a private employer and a private labor organization does not involve state action. Pet. App. 5a-6a. That court also ruled that the statutory claims under the NLRA against CWA and AT&T were barred by the six month limitations period in NLRA § 10(b), 29 U.S.C. § 160(b). Pet. App. 6a-10a. Finally, the district court determined that there was no jurisdiction over Mr. Fitz's claims against the NLRB's General Counsel and her assistant in their official capacities for their handling of Mr. Fitz's unfair labor practice charges, Pet. App. 10a-17a, and that these defendants had immunity from Mr. Fitz's claims against them in their individual capacities, *id.* 17a-20a.

On October 30, 1990, the United States Court of Appeals for the District of Columbia Circuit (Mikva, Edwards & Silberman, JJ.), affirmed the decision of the district court. After hearing oral argument from the parties, the appellate court entered an order holding: "For the reasons discussed fully in Judge Lamberth's fine Memorandum Opinion, filed August 17, 1989, we find that these claims lack merit and were properly dismissed." Pet. App. 1a-2a.

ARGUMENT

1. The sole question raised by the petition for *certiorari* is whether the cause of action established in *Communications Workers v. Beck*, 487 U.S. 735 (1988), is governed by the six month limitations period in § 10(b) of the National Labor Relations Act, as amended (NLRA). This Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), makes it plain that the courts below answered that question correctly in holding that NLRA § 10(b) does bar Mr. Fitz's statutory claims under *Beck*.

In *Beck*, this Court held that NLRA § 8(a)(3) contains an implied limitation on the expenditure by a union of agency fees collected from objecting nonmembers. 487 U.S. at 738 & 762-763. An objecting nonmember may assert his rights under *Beck* by filing unfair labor practice charges with the NLRB or by bringing a federal court action alleging breach of the fair representation duty. *Id.* at 742-744.

The statutory claim identified in *Beck* arises directly from NLRA § 8—the Act's provision defining "unfair labor practices." *See* 29 U.S.C. § 158. And NLRA § 10(b) by its terms establishes a six month limitations period on claims alleging unfair labor practices under § 8 of the Act. 29 U.S.C. § 160(b). It is clear that this limitations period would govern any charges filed with the NLRB alleging the § 8(a)(3) violation identified in *Beck*, and Mr. Fitz has not even attempted to argue to the contrary.

As we have noted, a *Beck* claim can, in the alternative, be brought through a federal court suit alleging a fair representation breach. That alternative does not change the limitations period applicable to the underlying substantive claim.

In *DelCostello v. Teamsters*, *supra*, the Court held that the "family resemblance" and "substantial overlap" be-

tween breaches of the fair representation duty and unfair labor practices justifies applying the six month limitations period in § 10(b) to "hybrid § 301/fair representation" lawsuits. 462 U.S. at 170. The example cited to illustrate the "substantial overlap" between fair representation and unfair labor practice claims, demonstrates that § 10(b)'s limitation period applies here. In this regard, *DelCostello* notes that "[m]any fair representation claims . . . would be unfair labor practices under § 8(b)(1) or (2)." 462 U.S. at 170.

This case concerns just such a claim. Mr. Fitz's charge against AT&T is that the employer violated NLRA § 8(a)(3) by discharging him. This statutory provision defines one of the "unfair labor practices by employers," 29 U.S.C. § 158(a), that is subject to § 10(b). The plaintiff's claim against CWA, in turn, is that the Union breached its duty of fair representation by requesting that AT&T discharge the plaintiff, i.e., that CWA caused AT&T to discharge the plaintiff in violation of § 8(a)(3). That claim against the Union expressly alleges a violation of NLRA § 8(b)(2). Indeed, in this case, Mr. Fitz sued the NLRB General Counsel for refusing to issue a complaint against CWA alleging just such a violation.

Thus, Mr. Fitz's claim presents a paradigm example of the "overlap" between the duty of fair representation and the NLRA's unfair labor practice provisions relied upon by the *DelCostello* Court in applying § 10(b) to hybrid fair representation/§ 301 cases. Plainly then, as the courts below recognized, *DelCostello* governs in this case as well.

Against all this, Mr. Fitz argues that *DelCostello* applies only "to bar garden variety grievances which are tardily filed." Pet. 17. Every circuit to have considered this argument has ruled to the contrary. In so doing, the courts of appeals have "decline[d] . . . to adopt a rule that would permit varying statutes of limitation for a claim of breach of the duty of fair representation . . . de-

pending solely upon the facts pleaded in the complaint." *Kalombo v. Hughes Market, Inc.*, 886 F.2d 258, 259 (9th Cir. 1989). *Accord Richardson v. Steelworkers*, 864 F.2d 1162, 1167 (5th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 2204 (1990); *Eatz v. I.B.E.W. Local 3*, 794 F.2d 29, 33 (2d Cir. 1986); *Erkins v. Steelworkers*, 723 F.2d 837, 839 (11th Cir.), *cert. denied*, 467 U.S. 1243 (1984). These circuit courts have recognized that "[t]he chaos that would flow from such a doctrine would undo the certainty in the applicable statute of limitations achieved by the Supreme Court in *DelCostello*." *Kalombo*, *supra*, 886 F.2d at 259.[3]

Mr. Fitz would counterpose *Reed v. United Transportation Union*, 488 U.S. 319 (1989), to *DelCostello*, Pet. 19, but the two decisions are not at all in conflict. In *Reed*, the Court declined to apply NLRA § 10(b) to a claim under § *101(a)(2) of the Labor-Management Reporting*

---

[3] Mr. Fitz relies on *Adams v. Gould, Inc.*, 739 F.2d 858 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985), as contrary to this line of circuit court precedent. Pet. 18-19. The Third Circuit's opinion belies any such conflict.

Adams applied the three year limitations period found in the Employment Retirement Income Security Act (ERISA) to a claim that an employer had underfunded its pension trust in breach of its collective bargaining agreement. There was a fair representation aspect to the employees' suit against their employer, because the dispute over pension funding had arguably been settled by an arbitration award. *Id.* at 861. The Third Circuit, however, found the pension claim in *Adams* to be more like those covered by ERISA's provisions than like those covered by the NLRA unfair labor practice provisions. The court of appeals further justified applying the longer ERISA limitations period by noting that "the immediate effect of the [pension funding] dispute on the day-to-day labor-management relationship is slight," and "delay in resolving disputes concerning those interests does not disrupt labor-management relations." *Id.* at 867.

Since there is a precise overlap between Mr. Fitz's fair representation claim and the claim he attempted to assert through an unfair labor practice charge, and since enforcement of the agency shop agreement is very much a matter of day-to-day labor relations, the decision in *Adams* is not in conflict with the decision below or the authorities cited in the text.

and Disclosure Act (LMRDA) on the ground that the LMRDA "implements a federal policy . . . that simply had no part in the design of a statute of limitations for unfair labor practice charges." 488 U.S. at 332. Thus, *Reed* reaffirms the proposition that NLRA § 10(b) provides the appropriate limitations period on claims that *are* in substance unfair labor practices. And the statutory claims in this case are based on NLRA § 8, which does, in terms, define "unfair labor practices."

Curiously, Mr. Fitz's also argues that his claim implicates the "policy of voluntary unionism" discussed in *Pattern Makers v. NLRB*, 473 U.S. 95, 105 (1985). Pet. 19 & n. 67. But the claim in *Pattern Makers* was made pursuant to NLRA § 8(b)(1), was subject to the jurisdiction of the NLRB, and was indisputably covered by § 10(b).

2. The constitutional issue discussed in the argument section of the petition, pp. 8-15, is not fairly encompassed by the question presented. Sup. Ct. Rule 14.1 ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court."). The only question presented by the petition for *certiorari* concerns the appropriate statute of limitations in *Beck* cases. Pet. i. It is thus decisive here that, while the courts below dismissed Mr. Fitz's statutory claims on timeliness grounds, the lower courts dismissed his constitutional claims *on the merits*. Pet. App. 6a. That being so, the constitutional aspect of this case raises no timeliness issue at all.

Out of what may be an excess of caution, we also note that the decisions below do not in this respect raise any issue worthy of this Court's attention. Mr. Fitz's constitutional claims were dismissed on the ground "that a collective bargaining agreement between a private employer and a private union did not involve state action." Pet. App. 6a.

The "most fundamental[]" lesson of this Court's "state action" precedents is "that a government normally can be held responsible for a private decision only when it

has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government." *San Francisco Arts & Athletics v. U.S. Olympic Committee*, 483 U.S. 522, 546 (1987) (internal quotation marks and brackets omitted). Since the NLRA encourages free collective bargaining between employers and unions, and does not require the inclusion of agency shop clauses in the resulting agreements, the choice to include such a clause clearly cannot "be deemed to be that of the government."

It, therefore, comes as no surprise that, since *Beck*, the courts that have considered constitutional claims of the sort raised by Mr. Fitz have found such claims to fail for want of state action. *Abrams v. Communications Workers of America*, 702 F.Supp. 920, 921-923, 925-926 (D.D.C. 1988), *aff'd mem.*, 884 F.2d 628 (D.C. Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 540 (1989); *Price v. International Union, U.A.W.*, 722 F.Supp. 933, 936-937 (D.Conn. 1989), *appeal pending*, No. 90-7652 (2d Cir.).

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

JOHN H. CURLEY
Room 1107 E
1 Speedwell Avenue
Morristown, NJ 07960
Attorney for AT&T Communications, Inc.

JAMES B. COPPESS
Suite 411
1925 K Street, N.W.
Washington, D.C. 20006
LAURENCE GOLD
(Counsel of Record)
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for the Communications Workers of America

Supreme Court, U.S.
FILED
APR 8 1991
OFFICE OF THE CLERK

No. 90-1197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAVID L. FITZ,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION

HUGH L. REILLY
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel of Record for Petitioner

April 8, 1991

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

THE COURT HAS NOT ADDRESSED THE QUESTION PRESENTED 1

THE NATURE OF *BECK* CLAIMS WARRANTS APPLICATION OF THE LIMITATIONS PERIOD GOVERNING CONSTITUTIONAL CASES 2

State Action 2

Reed 5

Adams 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Page

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 1

Abrams v. Communications Workers,
702 F. Supp. 920 (D.D.C. 1988), *aff'd by adoption*, 884 F.2d 628 (D.C. Cir.), *cert. denied*, ___ U.S. ___,
110 S. Ct. 540 (1989) 2, 8

Adams v. Gould, Inc., 739 F.2d 858
(3d Cir. 1984), *cert. denied*,
469 U.S. 1122 (1985) 6, 7, 9

Chicago Teachers v. Hudson,
475 U.S. 292 (1986) 3

Communications Workers v. Beck,
487 U.S. 735 (1988) . . . . . *passim*

Dean v. Trans World Airlines,
924 F.2d 805 (9th Cir. 1991) 3, 8

DelCostello v. Teamsters,
462 U.S. 151 (1983) 8, 9

Ellis v. Railway Clerks,
466 U.S. 435 (1984) 1, 5

John Wiley & Sons v. Livingston,
376 U.S. 543 (1964) 4

Keller v. State Bar, ___ U.S. ___,
110 S. Ct. 2228 (1990) 2

TABLE OF AUTHORITIES - CONTINUED

Page

Machinists v. Street, 367 U.S. 740 (1961) 1, 2, 5

Price v. Auto Workers, 772 F. Supp. 933 (D. Conn. 1989), *aff'd*, ___ F.2d ___, 1991 WestLaw 26726 (2d Cir. 1991) 2, 8

Railway Clerks v. Allen, 373 U.S. 113 (1963) 1

Reed v. United Transportation Union, 488 U.S. 319 (1989) ..... *passim*

Vaca v. Sipes, 386 U.S. 171 (1967) 6

Constitutional and Statutory Provisions

U.S. Const. amend. I 6

National Labor Relations Act

§ 8(a)(3), 29 U.S.C. § 158(a)(3) 2

§ 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) 7, 8

§ 10(b), 29 U.S.C. § 160(b) 7

Labor-Management Reporting and Disclosure Act

§ 101, 29 U.S.C. § 411 ..... 5, 7, 8

§ 101(a)(2), 29 U.S.C. § 411(a)(2) 6

TABLE OF AUTHORITIES - CONTINUED

Page

Railway Labor Act

§ 2, Eleventh, 45 U.S.C. § 152, Eleventh 2

Miscellaneous

105 Cong. Rec. 5806 (1959) 4

ARGUMENT

David L. Fitz ("Fitz"), petitioner, herein replies to the Brief in Opposition of the Communications Workers of America, et al., respondents ("CWA"). At issue is the appropriate limitations period to be applied to claims for relief under this Court's decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988) ("*Beck*"). Fitz submits that *Beck* cases are quasi-constitutional; accordingly, the limitations period for constitutional claims is to be applied. Therefore, this Reply addresses the reasons why CWA's belief is invalid that the six-months limitations period governing unfair labor practice charges applies here.

THE COURT HAS NOT ADDRESSED THE QUESTION PRESENTED

CWA does not, and could not, state that this Court has previously addressed the limitations question presented. Though *Beck* is of relatively recent vintage, its distinguished forebearers, *Street*[1], *Allen*[2], *Ellis*[3], and *Abood*[4] all considered aspects of either the existence or nature of the substantive claim for relief. No case before this Court has considered or resolved the explicit limitations question presented by the *Fitz* petition.

CWA does not dispute Fitz's demonstration of the importance of the issue presented to the many thousands of employees compelled to support the non-bargaining expenditures of CWA and other labor organizations, expenditures which include significant amounts for promotion or defeat of candidates for public office, legislative lobbying, and other activities no one doubts are political in nature. Further, the limitations issue has

---

[1] *Machinists v. Street*, 367 U.S. 740 (1961).

[2] *Railway Clerks v. Allen*, 373 U.S. 113 (1963).

[3] *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

[4] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

application beyond the employee-labor organization relationship, for resolution of the issue would redound to the benefit of bar association members challenging bar association exactions under this Court's decision in *Keller*.[5]

For these reasons, a new, serious and substantial issue of broad application is presented for resolution by this Court.

THE NATURE OF *BECK* CLAIMS WARRANTS APPLICATION OF THE LIMITATIONS PERIOD GOVERNING CONSTITUTIONAL CASES

State Action

Fitz, in his opening brief at 8-15, sets forth the factual and legal basis for concluding that constitutional considerations infuse his claims under *Beck*.[6] CWA responds by citing two cases in which courts have denied direct relief for *Beck* claims made on First Amendment grounds.[7] Fitz neither denies the existence of those authorities, nor that they stand for the proposition for which CWA cites them. However, those cases conflict with the

---

[5] *Keller v. State Bar*, ___ U.S. ___, 110 S. Ct. 2228 (1990).

[6] That argument can best be summarized by citation to the position expressed by Mr. Justice Black: "Yet no one has suggested that the Court's statutory construction of § 2, Eleventh [of the Railway Labor Act] could possibly be supported without the crutch of its fear of unconstitutionality." *Machinists v. Street*, 367 U.S. at 786 (1961) (Black, J., dissenting.) Under *Beck*, 487 U.S. at 745, § 2, Eleventh of the Railway Labor Act involved in *Street*, and § 8(a)(3) of the National Labor Relations Act involved in the instant case, are to be interpreted the same.

[7] Brief in Opposition ("Opp. Br.") at 9. Those case are *Abrams v. Communications Workers*, 702 F. Supp. 920 (D.D.C. 1988), *aff'd by adoption*, 884 F.2d 628 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 540 (1989); and *Price v. Auto Workers*, 772 F. Supp. 933 (D. Conn. 1989), *aff'd*, ___ F.2d ___, 1991 WestLaw 26726 (2d Cir. 1991).

recent holding in *Dean v. Trans World Airlines*.[8] *Dean* is a Railway Labor Act case in which the procedural requirements of this Court's public-sector *Hudson*[9] decision were applied to protect an employee from union exactions for non-bargaining purposes. *Dean* states:

> *Hudson* establishes "constitutional requirements for the Union's collection of agency fees." (Citation omitted.) Without these procedures in place, the [public-sector and the private-sector] union has no right to enforce an agency shop agreement to collect fees for use in any union activity beyond collective bargaining.[10]

Thus, there is a direct conflict in the circuits as to the application of constitutional principles to unions' exactions of fees from nonmembers for purposes other than collective bargaining.[11]

In another context, CWA's counsel has acknowledged the validity of the "state action" argument Fitz presents. It is admitted, for example:

> [E]xclusive representation . . . significantly and necessarily alters the legal rights of each individual in the group [of represented employees] . . . .[12]
>
> A more complicated system of balanced interests thus emerges [from the statutory scheme], with the bargaining representative granted significant powers and legal protec-

---

[8] 924 F.2d 805 (9th Cir. 1991).

[9] *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986).

[10] 924 F.2d at 809.

[11] This is a question explicitly left open by this Court. *Beck*, 487 U.S. at 761.

[12] Brief of the American Federation of Labor and Congress of Industrial Organizations ("AFL Br.") at 8, filed in *Reed v. United Transp. Union*, 488 U.S. 319 (1989).

> tions [by the National Labor Relations Act], but made subject to certain public policy limits.[13]
>
> [U]nions themselves exist and operate under powers and protection conferred by the Federal Government in a unique manner and to an unequal degree.[14]
>
> "Central to the peculiar status and function of a collective bargaining agreement is the fact . . . that it is not in any real sense simply the product of a consensual relationship."[15]

Of course, nowhere, is the unique authority of a labor organization under our labor statutes more graphically illustrated than in cases in which employees are discharged for refusal to pay fees illegally demanded under *Beck*. *Fitz* is such a case. CWA admits that Fitz was discharged because "he believed that the CWA had not given sufficient support to a strike by the International Brotherhood of Electrical Workers that occurred while Mr. Fitz belonged to that union."[16] In litigation, however, CWA seeks to justify Fitz's discharge on grounds that the union "was suffering the loss of the contractual protections contained in the collective bargaining agreement by reason of Mr. Fitz's refusal to make the required agency fee payments."[17] Never has such callous action been so disingenuously stated. CWA does *not* advise the Court that the amounts demanded were equivalent to a full and voluntary member's dues to which it had no right under this court's precedents, not the *Beck* collective bargaining charge to which it may have been entitled.

---

[13] *Id.* at 9.

[14] *Id.* at 12 (citing the remarks of Senator McClellan, 105 Cong. Rec. 5806 (1959), reprinted in II NLRB Legislative History of the LMRDA 1098).

[15] *Id.* at 29 (quoting *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550 (1964)).

[16] Opp. Br. at 1-2.

[17] *Id.* at 2.

CWA also digresses at length on the existence of its faulty policy, condemned by *Ellis*[18], under which employees could obtain a post-collection, post-spending return of the union's excessive exactions.[19] CWA then suggests that it is a pleading flaw that Fitz "has not alleged that he invoked the Union's objection procedure."[20] *What CWA does not say is that the evidence would show that Fitz was not advised, by CWA or anyone else, of CWA's "objection procedure" at any time prior to his discharge.*[21] In any event, CWA, not Fitz, has the burden of showing that its "procedure" was timely presented and fully protective of Fitz's *Beck* rights.[22]

Reed

Fitz argues that even if this Court were not to hold that constitutional considerations directly control all aspects of *Beck* claims, the analysis employed by this Court in *Reed*[23] is equally applicable to *Beck* cases in determining the appropriate limitations period.[24] CWA opposes that argument by referring to that part of *Reed* stating that Title I of the Labor-Management Reporting and Disclosure Act ("LMRDA")[25] "'implements a

---

[18] 466 U.S. 435 (1984).

[19] Opp. Br. at 3 n.2.

[20] *Id.* The decisions below were not, in any respect whatsoever, predicated on a failure of pleading in this or any other regard. Indeed, CWA made no such claim below.

[21] CWA's discussion of the conclusions of the NLRB Regional Director, referred to in Opp. Br. at 2, is not to the contrary. The Regional Director found that CWA advised Fitz of the "amounts owed," but those amounts were the unlawfully demanded equivalent to a member's dues, *not* a *Beck* collective bargaining charge.

[22] *Street*, 373 U.S. at 122.

[23] *Reed v. United Transp. Union*, 488 U.S. 319 (1989).

[24] Opening Br. at 15-20.

[25] 29 U.S.C § 411.

federal policy . . . that simply had no part in the design of a statute of limitations for unfair labor practice charges'"[26] As *Reed* involved employees' rights under LMRDA § 101(a)(2)[27], which this Court characterized as "restat[ing] a principal First Amendment value,"[28] the language CWA quotes favors resolution of the issue in Fitz's favor, not CWA's.

Adams

Fitz also relies on the analysis in *Adams v. Gould, Inc.*[29] pertaining to the applicable limitations period.[30] CWA attempts to distinguish *Adams* by asserting that there is an "overlap" between Fitz's *Beck* claim, which contains a duty of fair representation element, and an unfair labor practice claim which is not present in *Adams*.[31] But such "overlap" as may exist is also present in *Adams*, for CWA concedes that the employees' claim in *Adams* contained "a fair representation aspect."[32] And that

---

[26] Opp. Br. at 8, citing *Reed*, 488 U.S. at 332.

[27] In pertinent part, the section provides, "Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions . . . ."

[28] *Reed*, 488 U.S. at 325.

[29] 739 F.2d 858 (3d.Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985).

[30] Opening Br. at 18-19.

[31] Fitz acknowledges that to some extent it could be said that there is "overlap" between the claim presented here and his unfair labor practice claim. However, the fact that they may "overlap" in some sense cannot obscure their pronounced differences. His federal court lawsuit is brought to vindicate his private claim. As a matter of law, his unfair labor practice claim was brought to vindicate public rights. *Vaca v. Sipes*, 386 U.S. 171, 182 n.8 (1967). ("The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair practice remedies.") Thus, only if Fitz had received an award as a result of his unfair labor practice and were here disputing the sufficiency of the award would there be "overlap" of a preclusive kind.

[32] Opp. Br. at 6 n.3.

"fair representation aspect" in *Adams* did not impose an abbreviated limitations period, and should not do so here.

Moreover, *Reed* also contains duty of fair representation and unfair labor practice elements. That supposed "overlap" is no more a basis for refusing to apply *Adams* than it is *Reed*. For this Court rejected the argument made in *Reed* that the existence of duty of fair representation and unfair labor practice elements in a Title I claim called for application of a curtailed limitations period.[33]

Counsel for CWA in the instant case also submitted the *amicus* brief of the American Federation of Labor and Congress of Industrial Organizations in *Reed* as noted above. That *amicus* brief repeatedly made the "overlap" argument which *Reed* rejected. It was claimed, for example, that:

> [T]here is a "substantial overlap" of coverage between LMRDA Title I on the one hand, and the NLRA unfair labor practice provisions and the duty of fair representation on the other.[34]
>
> [A]t least in theory virtually all Title I claims alleging discipline based on "dissident" activities can be brought as a § 8(b)(l)(A) charge as well.[35]

---

[33] "Even were it the case, however, that Title I violations may constitute unfair labor practices and breaches of the duty of fair representation . . . we would still hold this resemblance inconclusive as regards the question whether § 101 actions should be governed by a state statute of limitations or by NLRA § 10(b)." *Reed*, 488 U.S. at 333 n.7.

[34] AFL Br. at 2.

[35] *Id.* at 3.

> Congress passed the LMRDA "for the same reasons" that motivated the Court in crafting the duty of fair representation . . . .[36]

> [U]nder the current state of the law, the overlap between LMRDA Title I and NLRA § 8(b)(1)(A) is near total.[37]

> [N]either do all duty of fair representation claims implicate the concerns for industrial stability expressed in *DelCostello* [*v. Teamsters*, 462 U.S. 151 (1983)]. No such uniformity is needed.[38]

Thus, not only this Court's holding in *Reed*, but the positions of the unions before the Court in that case completely and totally rule out the arguments made by CWA here. For the "near total" "overlap" between Title I cases and the instant case compels, as Fitz has stated, the application of the *Reed* principle, and not *DelCostello*.

CONCLUSION

By its silence on the point, CWA concedes that Fitz would have prevailed below if constitutional principles had been applied to his case. It does not contend that Fitz's federal complaint would be barred by the limitations period applicable to such claims. Therefore, whether there is sufficient state action in the natures of Fitz's claim and CWA's exercise of its authority as exclusive representative to demand and obtain his discharge, to apply the limitations period of constitutional claims to *Beck* cases warrants this Court's consideration because of the conflict between *Dean* and *Abrams/Price*. Further, whether *Beck* claims are so similar to constitutional claims as to warrant application of

---

[36] *Id.* at 16.

[37] *Id.* at 22 n.8.

[38] *Id.* at 28 n.14.

the analysis in *Reed/Gould* rather than *DelCostello* raises a serious and substantial question of law which has not been but should be answered by this Court. These issues affect the respective rights and duties of employees and labor organizations, and, as a practical matter, affect whether employees can obtain any relief for *Beck* violations.

For all of these reasons this Court should grant certiorari and fully consider this case on the merits.

Respectfully submitted,

Hugh L. Reilly
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel of Record for Petitioner

April 8, 1991